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PLEA NEGOTIATION

A Selected Bibliography

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National Criminal Justice Reference Service

May 1980

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TABLE OF CONTENTS

Introduction. v

Acknowledgment. viii

How To Obtain These Documents ix

Chapter I--Overview 1

Chapter II--The Nature of Plea Negotiation. 23

Chapter III--Eliminating Plea Negotiation 49

Chapter IV--Restructuring Plea Negotiation. 63

Chapter V--Legal Issues and Federal Rules 73

Appendix A--Case Summaries. 93

Appendix B--Reprint of Federal Rule 11. 101

Appendix C--List of Sources. 105

INTRODUCTION

Although plea negotiation has many definitions, it commonly refers to a reduction in charge and/or sentence recommendation given in exchange for a guilty plea. The actual operation of this important procedure is now the subject of intense debate. Concerns over the fairness and effectiveness of plea negotiation have prompted a number of proposed reforms. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals called for the elimination of plea negotiation by 1978. In contrast, the American Bar Association advocates reform rather than abolishment.

In jurisdictions where plea negotiation is applied, it can account for as much as 90 percent of all criminal convictions. Yet the reasons for its prevalence are not totally clear. It has been attributed to such factors as "the press of heavy caseloads, the oppressiveness of pretrial detention, the low quality of public defenders, the financial incentives of private attorneys, and the stupidity of judges."[1] Recent empirical studies, however, point out the difficulty in associating these factors with the use of plea negotiation. Malcolm Feeley, for example, has pointed out that historical research has identified the rise of specialization and professionalism in the adversarial process as a possible cause.[2]

The cause of plea negotiation may be unknown, but one fact is certain, "Of the thousands and thousands of people who are arrested and charged with crimes every year, only a tiny percentage will actually go to trial."[3] Along with a variety of types of dismissals and diversions, plea negotiation accounts for a large number of nontrial settlements. But the actual point of origin is difficult to pinpoint. It emerged as a significant part of the American criminal justice system after the Civil War. By the beginning of the 20th century, plea negotiation had become the dominant method for resolving cases.[4] And despite the present controversy, it is likely to continue for some time.

Proponents defend the use of plea negotiation for a variety of reasons. Among these is the belief that the courts would face a tremendous burden of additional cases if plea negotiation were eliminated. Although a direct link between caseload and plea negotiation has not been substantiated, many support its operation for this reason alone. In Santabello v. New York 404 U.S. 257,

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[1] Law & Society Review, v. 23, n. 2. Special Issue on Plea Bargaining, Winter 1979. R. L. Abel, Ed. (see entry no. 1) pp. 200-201.

[2] Law & Society Review, pp. 200-201.

[3] Plea-Bargaining in the Light of Archival Data: A Study of Alameda County, California," by C. J. Halverson et al. (see entry no. 17) p. 1.

[4] Law & Society Review, p. 212.

(1971), the United States Supreme Court sanctioned the use of plea negotiation when Chief Justice Burger, in writing for the majority, issued the following statement:

> ..."plea bargaining"...is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Opponents of plea negotiation often say that it runs counter to the very ideals of the American system of justice. They argue that the aggressive actions of zealous prosecutors seeking to bolster their conviction rates coerce many defendants into accepting a guilty plea. They contend that many innocent individuals plead guilty to offenses for which they are not responsible, primarily because of state's attorneys' threats to prosecute them for a more serious crime, and potentially a more severe punishment. Another argument points to the unfair nature of sentencing under a negotiated plea. Many believe that those who plead guilty receive lenient sentences, while those who exercise their Constitutional right to trial subsequently receive stiffer sentences.

The controversy and concern stemming from the use of plea negotiation have caused some jurisdictions to implement alternatives. Alaska, El Paso County (Texas), and Wayne County (Michigan) have banned the use of plea negotiation. Other jurisdictions, such as Dade County (Florida), have experimented with the use of structured conferences where all parties concerned are present during all negotiations.

This bibliography, compiled from the NCJRS collection, focuses attention on the issues surrounding plea negotiation. While not definitive, it is a guide for interested professionals and the general public to topical literature. The citations are presented in five chapters:

- Overview

  This section includes a representative selection of abstracts that provide a general discussion of the historical and theoretical perspectives of plea negotiation and its advantages and disadvantages.

- The Nature of Plea Negotiation

  The methods of operation and the structure of plea bargaining are described in this chapter.

- Eliminating Plea Negotiation

  This chapter presents arguments and proposals for eliminating plea negotiation and reports on districts where plea negotiation has been eliminated.

- **Restructuring Plea Negotiation**

  Arguments and plans for restructuring plea negotiation, including alternatives now in practice, are reviewed in this section.

- **Legal Issues and Federal Rules**

  Case commentaries on major constitutional questions and discussions of Federal rules governing plea negotiation appear in this section.

- **Appendix A**

  Case Summaries

  Twelve major Supreme Court case summaries dealing with plea negotiation supplement the discussion in Chapter V.

- **Appendix B**

  Reprint of Federal Rule 11

  A reprint of the Federal rules governing the plea negotiation process is provided.

Information about how to obtain these documents may be found on page ix.

ACKNOWLEDGMENT

Linda McKay of the National Institute of Justice (Adjudication Division) has been especially helpful in the development of this publication and her interest and contribution are gratefully acknowledged. The Supreme Court case studies were researched and prepared by the Aspen Research Information Center (ARIC), a legal research service of Aspen Systems Corporation.

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CHAPTER I—OVERVIEW

1. ABEL, R. L. Plea Bargaining. Law and Society Review, v. 13, n. 2:197-687. Winter 1979. (NCJ 59915)

Papers presented at a 1978 symposium discuss issues in plea bargaining: its nature; its causes, consequences, and legitimacy; and proposals to eliminate, reform, or restructure it. The papers were presented at the Conference on Plea Bargaining, French Lick, Ind., June 14-17, 1978. This symposium, designed to overcome some of the research difficulties, included papers which moved beyond the confines of specific disciplines and perspectives. Plea bargaining is placed in a historical perspective to identify the factors that have contributed to its growing use. A sense of the diversity of plea bargaining procedures (and their relative merits) is evident in discussions of English, German, and specific U.S. systems. Not only is there a wide variety of plea bargaining systems, but there is a host of complex issues which have yet to be addressed concerning plea bargaining processes. Experience has shown that in a significant number of criminal cases, perhaps a substantial majority, the standard model of plea bargaining may be inappropriate. Even though several efforts are underway to abolish or reform plea bargaining procedures, many academicians are starting to defend the system. Reviews of nine recent books dealing with the plea bargaining process are also presented, along with responses by four of the authors. Footnotes and references are provided for most of the articles. An extensive bibliography is appended. For individual papers, see NCJ 59916-59930.

2. ADELSTEIN, R. P. Negotiated Guilty Plea: A Framework for Analysis. New York University Law Review, v. 53, n. 4:783-834. October 1978. (NCJ 53498)

Institutional economic theory is employed to examine fairness and efficiency aspects of plea bargaining, with considerations given to both economic and moral costs of crime. Plea bargaining, in which accused persons surrender their constitutional right to trial in exchange for sentence leniency, has become the primary means of adjudicating criminal violations; 90 percent of criminal convictions are by guilty plea. The analysis of the plea bargaining system draws its techniques from institutionalism, a distinctive school of economic thought. Institutional theory seeks to account for the organization of economic activities and for the evolution of particular social and economic institutions within a market exchange-based social order. The value of an institutional economic approach to issues in criminal law is based on the ability of its market model to provide insights about observed phenomena (human activities) and to make explicit value judgments inherent in the criminal process. The following aspects of crime and plea bargaining are addressed within the context of institutional economic theory: costs of crime, determining the punishment price, exacting the punishment price (transaction costs), the negotiated plea in the price exaction framework, economic considerations in perfecting the plea bargain, and moral issues related to external aspects the plea bargain. The institutional model is considered to be an empirical or sociological advance over other discussions of the criminal process because it more accurately reflects the costs of crime. Case law is reviewed.

3. ALSCHULER, A. W. Defense Attorney's Role in Plea Bargaining. Yale Law Journal, v. 84, n. 6:1179-1313. May 1975. (NCJ 16464)

An assessment of the role actually played by the defense attorney in today's guilty plea system, with emphasis on the effectiveness of counsel in defending the client's rights and the problems of the plea bargaining system. The criminal defense attorney is often seen as a romantic figure--a sophisticated master of the system whose only job is to be on the defendant's side. In accordance with this view, it is common to regard the right to counsel as a primary safeguard of fairness in plea bargaining. The Supreme Court and other observers of the plea bargaining process have relied heavily on the assumption that criminal defense attorneys will, almost invariably, urge their clients to choose the course that is in their clients' best interests. However, this assumption merits examination in terms of the actual workings of the criminal justice system. This article explores the extent to which the presence of counsel does provide a significant safeguard of fairness in guilty plea negotiation, and finds that current conceptions of the defense attorney's role are often more romanticized than real. The thesis of this article is that the plea bargaining system is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships. The author contends that this system subjects defense attorneys to serious temptations to disregard their clients' interests--temptations so strong that the invocation of professional ideals cannot begin to answer the problems that emerge. The research for this article consisted of interviews with prosecutors, defense attorneys, trial judges, and other participants in the criminal justice system in 10 major urban jurisdictions. The role of the privately retained attorney is first examined. The functions of public defenders, other appointed attorneys who represent indigent offenders, and defendants who represent themselves in the bargaining process are examined and compared to the conduct of private attorneys. This article presents some of the serious problems, incongruities, and ethical dilemmas that the guilty-plea system has created, and the author concludes that nothing short of abolition of plea bargaining promises satisfactory resolution of these problems.

4. __________. Prosecutor's Role in Plea Bargaining. University of Chicago Law Review. v. 36:50-112. 1968. (NCJ 14629)

A discussion of plea bargaining, focusing on factors guiding the prosecutor's decision, the flexibility of the practice, and the practice of overcharging. In bargaining and making concessions for pleas, the prosecutor becomes to some degree an administrator, an advocate, a judge, and a legislator. As an administrator, his goal is to dispose of each case in the fastest, most efficient manner in the interest of getting his and the court's work done. As an advocate, his goal is to maximize the number of convictions and severity of sentences. As a judge, he purports to do what is "right" for each individual defendant. Finally, as a legislator, he attempts to lessen the impact of statutes that he feels command too harsh a penalty for the crime. Other factors influence the prosecutor in bargaining to a lesser extent--personal relationships between the prosecutor and defense attorney, attitudes of the police personnel involved, the race and personal characteristics of the defendant, and the desires of the victim. Prosecutors' concepts of the four basic roles vary considerably. Only a few accept the legislative role--most feel it would be improper to let their judgments of the law influence their opinions. The judicial role is unimportant to most. (It is interesting to note, however, that a few, especially older, career prosecutors believe this should outweigh all other factors.) Most agree that the administrative role is the most basic. Prosecutors in the study were virtually unanimous on one point--the strength or weakness of the state's case is the most important factor in bargaining. The weaker the prosecutor's case, the greater his concessions. As concessions increase, the defendant feels a tremendous pressure to plead guilty. The defendant simply cannot risk a conviction when he is offered a mild sentence in return for a plea to a minor charge. Since it can be assumed that the chances of the defendant being innocent increase as the state's case weakens, the dangers of false convictions are apparent. Although few would admit to prosecuting an individual while not being personally convinced of his guilt, this often happens in the "heat of the prosecutor's day." Penological factors are not considered in the prosecutor's administrative role. Plea bargaining is more flexible than traditional forms of adjudication. Flexibility is, however, an advantage that all lawless systems exhibit in comparison with systems of administering justice by rules. Although most would probably disapprove of granting the court the lawless flexibility that the prosecutor enjoys in plea bargaining, at least decisions then would be visible and made on the basis of the evidence. Prosecutors often will bargain after conviction to avoid a possible unfavorable decision on appeal. After conviction, a motion for a new trial is granted, a guilty plea is accepted, and a favorable sentence is imposed at the second trial. This practice is less frequent than pretrial bargaining. The original charge is the "asking price" in a bargaining situation. Although most prosecutors condemn overcharging, they define it differently than defense attorneys. To prosecutors, overcharging is accusing the defendant of a crime of which he is clearly innocent to induce a plea to the "proper" crime. Defense counsels identify two types of overcharging. "Horizontal" overcharging is the unreasonable multiplying of accusations against a single defendant. He may be either charged with a separate offense for every technical criminal transaction participated in or the prosecutor may fragment a single criminal transaction into numerous component offenses. "Vertical" overcharging is charging a single offense at a higher level than the circumstances of the case seem to warrant. The original charge usually encompasses the charge the prosecutor "wants" as a lesser included offense. Defense counsels agree that the charges may be perfectly legal. On the other hand, they note that prosecutors rarely seek convictions on the original complaint. Prosecutors' motives in plea bargaining are often at variance with their duties as guardians of the public interest. The prosecutor gains a conviction--an occupational and political plus--when he grants leniency and accepts a plea. The public interest, however, may be better served by a lengthy prison term. In highly publicized cases of particularly brutal crimes, the prosecutor may elect to blame an acquittal on the jury in a weak case rather than accept a plea and appear lenient. The public interest, however, may be better served by even a short period of confinement. Most prosecutor's careers are relatively short. With an eye towards practice on the "outside," the prosecutor's motives to be liked by other members of the profession may result in unwarranted generosity. Under the plea bargaining system, an objective evaluation of treatment goals never occurs. Plea bargaining merges the function of the criminal justice system into a single judgment often influenced by extraneous factors and personal interests.

5. AMERICAN BAR ASSOCIATION. Plea Bargaining: Nemesis or Nirvana? Washington, 1977, 20 p. (NCJ 44809)

The text of a panel discussion on the advantages and disadvantages of the practice of plea bargaining is presented. The discussion was held at the annual meeting in Chicago on August 9, 1977, of the American Bar Association, Section of Criminal Justice, Washington, D.C. A judge opposed to the process describes a 20-month experiment in which plea bargaining was eliminated in his court through introduction of sentencing guidelines. It was observed that prison terms increased, and the judge argues that career criminals were thus being kept off the street for longer periods of time. Another member of the panel, a district attorney, maintains that only certain offenses should be withdrawn from the plea bargaining process. A program instituted in his county focused on "targeting" armed robbery and burglary defendants to see if the elimination of charge reduction would act as a deterrent. The program eliminated backlogs in the court's dockets, and the district attorney's office prosecuted twice the rate of robbery and burglary cases as before. Another panel member maintains that the plea negotiation process can dispose of cases in a manner advantageous to the client. A defense lawyer discusses plea bargaining in the area of white-collar crime. Concentrating on the plea of "nolo contendere," he traces its origin through English law to its present use. A law professor concludes the panel by outlining the results of a 2-year study funded by LEAA and the National Institute of Law Enforcement and Criminal Justice. There exists a great variety in the practice of plea bargaining throughout the country, he notes. (Author abstract modified)

6. BARBARA, J., J. MORRISON, and H. CUNNINGHAM. Plea Bargaining: Bargain Justice. Criminology, v. 14, n. 1:55-64. May 1976. (NCJ 34759)

A review of the literature on plea negotiations is presented, in which the authors examine the history, operations, and effects of plea bargaining, and outline several suggested reforms of this procedure. A historical overview of the plea bargaining process through the past few centuries is presented. The advantages and disadvantages of the use of the legal mechanism are given. A research project conducted in Pima County, Ariz., covering 500 convicted persons who had been involved in plea bargaining is described, and the findings indicate that the majority of individuals included in the study willingly accepted the concept and felt that the practice should not be discontinued. A recommendation for modification of the process is presented which states that cases should be reviewed for plea bargaining by an independent agency apart from the court and prosecutor. This would ensure that the individual was aware that he was abrogating his rights of appeal, thereby eliminating any further investigation of his case. (Author abstract)

7. BASHARA, G. N., Jr. and S. C. GARDNER. Plea Bargaining: A Useful Tool in the Criminal Justice Process. In Criminal Justice Issues: Prompt Trial. Detroit, Citizens Research Council of Michigan, 1978. 10 p. (NCJ 50091)

Plea bargaining is examined as one way of handling the large volume of criminal caseloads, as a cost-effective process, and as a technique for assuring fairness in court trials. The plea bargain includes both charge bargaining and sentence bargaining. Plea bargaining is defined as the process whereby the defendant agrees to plead guilty or no contest as part of an agreement with the court or prosecutor. The usual effect of such an agreement is that trial is avoided and the defendant's potential punishment may be fixed within certain boundaries or agreed upon with specificity. Charge bargaining occurs when the defendant waives his or her right to stand trial in exchange for a reduced charge. Sentence bargaining occurs when the prosecutor agrees to stipulate to or recommend a particular sentence to the court in exchange for a plea of guilty. If plea bargaining is properly practiced, a bargained plea should accurately reflect the point at which expectations of the prosecutor and the defendant intersect and the sentence or charge should be reduced proportionately to the probability of conviction. Plea bargaining can eliminate the costs of trial and makes the judicial system appear more certain and fair. The most well-known advantage of plea bargaining is the reduction of court congestion. Computer simulation of the processes in the Detroit (Mich.) recorder's court suggests that if plea bargaining were eliminated, 70 judges (there were 20 in 1977) would be required for trials alone. Critics of plea bargaining fall into two categories: persons who believe plea bargaining deprives the defendant of important constitutional rights and pressures the innocent defendant to plead guilty, and persons who believe that the defendant is getting off too easy with a reduced charge and sentence. There are, however, some protective devices built into the plea bargaining system to protect the innocent defendant from being pressured into guilty pleas. Unless the public can be convinced that benefits associated with trial are equal to costs, plea bargaining will continue to be an integral and effective part of the criminal justice system. Case law and footnotes are cited.

8. BUCKLE, S. R. and L. G. BUCKLE. Bargaining for Justice: Case Disposition and Reform in the Criminal Courts. New York, Praeger Publishers, 1977. 188 p. (NCJ 50817)

This text discusses plea bargaining as it relates to the administration of criminal justice and reform of the bargaining system. A case study entitled "Bargaining for Justice" is presented. Defendants who enter pleas of guilty are processed without trial, and it is assumed generally that they forgo trial in exchange for special considerations from the court. Guilty pleas, however, can also be indicators of other transactions between the defendant and the court; the defendant merely can insist that he is guilty. Descriptions of plea bargaining and the debate that has surrounded it and some proposals for its modification are presented. In each case, the purpose in the text is to pursue the assumptions of those who examine plea bargaining and to determine why bargaining in courts is viewed as a social problem and not as a routine social function as it is in other areas of life. The case study indicates that bargaining exists in the courts, not only in the form of classic plea bargaining, but also as a mode of interaction among the court personnel. Bargaining shapes the social organization of the courts at two levels: (1) the trajectory of each case is largely determined by a series of bargains among several court personnel, each bargain being affected by prior bargains and in turn affecting future negotiations; and (2) bargaining as a system of human interchange creates the milieu of the court by setting values that inform the choices of participants in bargaining, determine the rewards and sanctions that can be imposed on court officials, provide the court with the means of accomplishing its ends, and allow participants to structure their time and allocate resources. Most reforms based on direct regulations ignore some critical forms of bargaining which affect plea bargains and important participants in the process. Effective reform of the courts and the bargaining system must take into account the full meaning of bargaining for the court community.

Several steps are suggested to help realize a due process of plea bargaining: (1) make bargaining more equitable by setting ground rules; (2) increase bureaucratic authority within the courts for monitoring the bargaining process; (3) develop the role of the medical and rehabilitation community in bargaining; (4) promote discussion of pleas in open court; (5) retain the adversarial, due process trial; and (6) create a system of appeal from a plea.

9. CLEARY, J. J. Plea Negotiation and Its Effects on Sentencing. Federal Bar Journal, v. 37, n. 1:61-75. Winter 1978. (NCJ 50805)

The impact of plea negotiation on the Federal criminal justice system is assessed, with attention given to the constitutional basis, procedures, and mechanics of plea bargaining and to existing sentencing alternatives. Following an overview of the roles played by the defense, prosecution, and judiciary in plea negotiations, Supreme Court decisions and Federal rules are cited to highlight the constitutional basis and the applicable Federal procedures regarding plea negotiations. The actual mechanics of plea bargaining are discussed, such as the entry of a guilty plea to a different offense carrying lesser penalty provisions but not considered a lesser inclusive defense (e.g., a defendant charged with mail theft pleads guilty to obstructing the mail). The broad range of disposition and sentencing alternatives which might be considered during plea negotiations include prevention of the filing of the complaint or charge, informal deferred prosecution, formal deferred prosecution, formal or informal deferred prosecution with a guilty plea, deferred sentencing and expungement of records, judgment hold, fines, probation, split sentence, commitment for presentence study, sentence of 1 year or less, "B" number sentence parole release with no minimum time served for a defendant sentenced to a term exceeding 1 year, general parole provisions, statutory good time, the Youth Corrections Act, the Narcotics Addict Rehabilitation Act, the Federal Juvenile Delinquency Act, and such special considerations as presentence credit, special parole terms, motions to reduce, and consecutive or concurrent sentences also are a possibility. Proposed Federal criminal code sentencing provisions and the evaluation, by participating counsel, of the pros and cons of individual plea negotiations are considered. It is argued that while the proposed reforms would control judge's discretion, that of the prosecutors in the charging process would remain unbridled. It is concluded that plea bargaining is an evil process which must be tolerated in order to avoid a breakdown in a criminal justice system incapable of handling the caseflow that would result if more than 15 percent of all Federal cases went to trial. References are footnoted.

10. COUSINEAU, F. D. and S. N. VERDUN-JONES. Evaluating Research Into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers. Canadian Journal of Criminology, v. 21, n. 3:293-309. July 1979. (NCJ 58636)

Major assumptions which shape the outcome of plea bargaining policymaking in the United States and Canadian criminal justice systems are examined. While the trend in U.S. policymaking with regard to plea bargaining has been towards legitimization and regulation, the major drift in Canadian policymaking has been toward strict disapproval and even rigorous suppression of the practice. One of the most persistent flaws in the policymaking process appears to be a lack of an operational definition of plea bargaining, and one of the major factors contributing to the lack of conceptual clarity in the plea bargaining literature is the absence of empirical research based upon actual observation of the pretrial interaction of defense and prosecuting attorneys. Empirical knowledge about such interaction comes from inference from secondary sources such as the raw rates of guilty pleas in a given jurisdiction, interviews or questionnaires with various actors in the pretrial process, observations of the courtroom drama, and case files. Some of the assumptions upon which U.S. policymakers have taken decisive action include the belief that plea bargaining is a necessary evil in the context of a criminal justice system burdened with huge caseloads, and the notion that any increase in the trial rate will automatically necessitate a costly increase in court resources. While it is assumed that many of the problems besetting court systems are of relatively recent origin, and that the high rates of pleading guilty are a modern phenomenon, scant data exist with which to assess this belief. A critical flaw has been the failure to examine the practice of plea bargaining within the broader context of the total criminal justice system, and to investigate the implications of change within the prosecutorial component of the justice system for "bargaining" practices with the police, the judiciary, and correctional authorities. A major priority in the decisionmaking process should be the development of a broad systems approach to the whole area of criminal justice research and policymaking; the implications of plea bargaining must be examined from the point of view of the whole range of criminal justice system agencies, including (at least) the police, probation officers, prosecutors, defense attorneys, the judiciary, and parole boards. There must be an appreciation of the need for comparative research in the area of plea bargaining, and a variety of concrete research methologies should be developed, such as a comparative cohort study which traces the flow of accused persons through each phase of the criminal justice process. This would include direct observation of the plea bargaining process itself. Footnotes support the text.

11. DAVIS, A. E. Sentencing Procedures in England and America: American Bargains or English Justice. Journal of Psychiatry and Law, v. 3, n. 4:447-462. Winter 1975. (NCJ 36711)

This article traces the relationship between guilty pleas and sentencing, demonstrating the effect of plea bargaining on this relationship. The meaning attributed to the underlying requirement that negotiated and unnegotiated guilty pleas be voluntary is investigated, and the differing attitudes of the English and American courts to this requirement are compared. The scope of plea bargaining practices in both the English and American legal systems is contrasted and evaluated. (Author abstract modified)

12. DODGE, D. C. Plea Bargaining Revisited. State Court Journal, v. 2, n. 4:13-18, 38-40. Fall 1978. MICROFICHE (NCJ 52164)

Myths surrounding plea bargaining are examined, the actual operation of the system is explored, and some suggestions are made for reform. It is concluded that some form of plea bargaining is inevitable. Both sides of the argument that plea bargaining is resorted to by overworked courts is found to be invalid. The number of cases settled through negotiated pleas bear no relationship to the size or workloads of courts. Instead, it is a function of the arrest and indictment process. It is suggested that opponents of plea bargaining assume that the crime charged was committed, that the proof necessary for trial exists, that the evidence is legally admissible, that the finder of fact will be persuaded, and that the actual punishment for a more serious charge will be greater than that for a lesser. None of these assumptions are necessarily true. Examination of actual cases shows that cases most likely to be negotiated are those with weak evidence, reluctant witnesses, and dubious chances for successful prosecution. Since charges can be reduced, but not increased, without additional paperwork, "overbooking" is common. These procedures are considered an invitation to plea bargaining. Tables show the percentages of cases negotiated in seven cities. The relationship between plea bargain rates and trial rates is examined, and it is concluded that plea bargaining does not necessarily reduce total trial rates. Plea bargaining is considered to be inevitable in the justice system as currently structured. However, plea bargaining needs to be reformed by establishing clear guidelines, reducing overbooking, and making realistic early case assessments. References are included.

13. ENKER, A. Perspectives on Plea Bargaining. In Task Force Report: The Courts. Washington, U.S. President's Commission on Law Enforcement and Administration of Justice, 1967. 12 p. MICROFICHE (NCJ 14624)

Description of the negotiated plea, a discussion of administrative considerations, and the various legal issues associated with the practice are given. The author outlines three common motives for bargaining held by defendants: (1) they seek less serious or fewer charges than than originally presented in return for their guilty plea, (2) they may offer to plead guilty to a certain offense to maximize judge sentencing discretion, where a mandatory sentence would accompany conviction on the original counts, (3) the defendant may desire to plead guilty to an alternative offense when a conviction on the original charge would be accompanied by undesirable, repugnant collateral aspects, as in sex crimes. These changes in the conviction label raise serious problems for the criminal justice system. Procedurally, "pack room" discussions and bargain sessions leave no record, complicating the job of correctional authorities and others who enter the process at later stages. Moreover, prosecutors and defendants may represent only their narrow self-interests, the prosecutor's desire for a conviction and the defendant's desire to get off with as little as possible. Consequently, the public interest is left unprotected. The system bears a risk, to an unknown extent, that innocent defendants may plead guilty, that negotiations revolving around "how many years a plea is worth" may subvert any rehabilitative sentencing goals, that factual information relating to the individual characteristics and needs of a particular defendant will never be developed, and that a feeling that a sense of purposelessness and lack of control may pervade the entire system. Plea bargaining does serve numerous useful ends--administrative burdens are eased. Trials become more meaningful for those defendants whose cases contain real disputes or real serious legal issues and who litigate these questions at trial. Bargaining furnishes a means to mitigate the harshness of a system that harbors occasional inequities. It affords the defendant some participation in and control over the process of his adjudication and sentencing. The author counters several often heard criticisms of the practice of bargaining. He contends that the risk that innocent defendants will plead guilty, while of obvious concern, is comparable to the anxiety that accompanies trials, which do not always result in truthful or accurate verdicts. In some respects, adjudication by bargaining may be more rational than by trial--a jury is often left with the extreme alternatives of guilt or innocence, with no room for intermediate judgment. Bargaining, however, leaves both prosecution and defense with other viable options. A major criticism of plea bargaining is its lack of visibility. Professor Enker argues that while the process is indeed less visible to the public and law professors, it is more visible to the parties most directly involved and affected--the defendant and defense counsel, who are able to participate in both the adjudication and sentencing phases. The bargain, consequently, may be looked at as an attempt by the defendant to preserve his dignity by finding a role for himself even if it means a sentence based on penologically irrelevant criteria. On the issue of voluntariness, similar notions of dignity seem to require that the defendant be allowed to judge and act intelligently in his own self interest, with adjudication by trial viewed as an available, rather than a preferred or desired procedure. The practice is ripe for revision and reform. The author suggests that three key areas should be explored by any examination--early development and agreement on facts by the prosecution and the defense, free exchange of ideas, and early participation in the process by the judge. All three, he contends, could be accomplished by a "pre-plea" conference. One possible procedure might be to call such a conference after an agreement has been reached. Where there is disagreement, there should be comparable opportunity, perhaps only at the defendant's option, to argue and confer with a judge. In light of these considerations, including the benefits to both the system and to defendants that can be derived from a controlled system of plea negotiations, the author contends that it would not be desirable to lay down a broad constitutional dictum forbidding the practice. It would be a mistake to push valid legal or constitutional insights to the ultimate of their logic. Accommodation of conflicting interests is a more sensible pursuit.

14. FOLBERG, H. J. Bargained for Guilty Plea: An Evaluation. Criminal Law Bulletin, v. 4, n. 4:201-212. May 1968. (NCJ 30297)

This paper evaluates the policy desirability of negotiated pleas based on an analysis of the guilty plea process in terms of the due process features of accuracy, fairness, and insulation against corruption and abuse. The author explores the appropriateness of plea bargaining in our system of criminal administration and the potential evils generated by the practice. He also examines the major arguments in favor of plea negotiation and looks at their common premise--the need of plea negotiation to sustain an adequate flow of guilty pleas in a system of limited resources. Finally, he reviews statutory and practical variations in the system, as practiced in some jurisdictions, which appear to be a reasonable alternative to the need for guilty plea negotiations. It is concluded that if one accepts that guilty plea negotiations are not the most appropriate method to administer criminal law in our society, then the burden is created to establish their necessity for the operation of our system of justice. The need for guilty plea bargaining has, it appears, been assumed rather than adequately explored and proved. (Author abstract modified)

15. GREEN, T. S., J. D. WARD, and A. ARCURI. Plea Bargaining: Fairness and Inadequacy of Representation. Columbia Human Rights Law Review, v. 7:495-527. 1975. (NCJ 55322)

The evolution of plea bargaining in the American judicial system, the advantages and disadvantages of plea bargaining for prosecution and defense, and redress in the instance of inadequate representation are discussed. Urbanization and an accelerating crime rate have pressured the criminal justice system to develop speedier processing alternatives to the lengthy adversarial trial process. Plea bargaining has developed as the principal means of expediting criminal cases. Through informal negotiations between the prosecuting and defense attorneys, guilty pleas are produced in exchange for reduced charges or lesser sentences than would be sought by the prosecution in a formal trial where the defendant would plead innocent. The necessity for a costly and lengthy trial is thus eliminated by plea bargaining. For the prosecution, plea bargaining offers a guaranteed conviction and the opportunity to process more cases in a given period of time. For the defendant, plea bargaining can lessen the charge and sentence brought and recommended to the court, such that a defendant likely to be proven guilty of a more serious crime with a more severe sentence can reduce the consequences of his offense through plea bargaining. In fact, the prosecution rarely initiates plea bargaining except in cases where circumstantial evidence may make a conviction questionable. The defendant is thus in a position to either risk winning full acquittal or in the event of a conviction receiving a severe sentence. Plea bargaining can be viewed as manipulative to the extent that a person availing himself of the constitutional right to a trial that can mean acquittal based on insufficient evidence is threatened with a maximum sentence for exercising that right. Should plea bargaining deprive a defendant of his rights through inadequate representation by defense counsel or failure of the prosecution to fulfill promises, court decisions have in the past made it difficult to gain redress; however, with the increased practice of plea bargaining, some courts have shown an increasing tendency to treat plea bargaining like a contract, where, if misrepresentation or default occurs, the injured party can proceed as though the contract were voided or have the terms of the contract fulfilled.

16. HARVARD LAW REVIEW ASSOCIATION. Unconstitutionality of Plea Bargaining. In Harvard Law Review. Cambridge, Massachusetts, 1972. 25 p. (NCJ 10686)

Plea bargaining is described as producing tension between judicial, administrative economy, and constitutional values. This article describes briefly the institution of plea bargaining, analyzes reforms recently proposed by the ABA, evaluates the constitutionality of curtailment of individual rights to promote efficiency in the administration of justice, and discusses the problem of enforcing a judicial determination that plea bargaining is unconstitutional. It is argued strongly that plea bargaining nullifies constitutional guarantees for large numbers of defendants. Although the author agrees that it would cause severe stress on the criminal justice system to eliminate plea bargaining, he contends that it is the legislature's responsibility to seek other means of increasing administrative efficiency.

17. HALVERSON, C. J., R. V. PERCIVAL, and L. M. FRIEDMAN. Plea-Bargaining in the Light of Archival Data: A Study of Alameda County, California. Stanford, California, Stanford University, 1977. 39 p. (NCJ 48044)

The history, status, and pro's and con's of plea bargaining are reviewed, and data on plea-bargaining practices in the Alameda County Superior Court from 1880 through 1974 are analyzed. The opening discussion reviews literature documenting arguments for and against plea bargaining, describes the various forms of plea bargaining, and cites historical studies of plea bargaining. The analysis of initial and changed pleas of guilty in Alameda County Superior Court since 1880 suggests that plea bargaining has been present since the court's beginning and that the form of bargaining has changed over the course of the period examined. Plea bargaining apparently was not unusual in the 19th century; however, neither then nor in the first decades of the 20th century was plea bargaining dominant. It was only after World War II that plea bargaining was formally used in the majority of felony cases. The data also suggest that both implicit and explicit bargaining have existed since 1880 but that implicit bargaining is being replaced by explicit bargaining. The trend in more recent years is for defendants to plead not guilty initially, bargain, change their pleas, and plead guilty to lesser or fewer charges. Implications of the findings for proposed reforms in plea-bargaining practices are discussed. Supporting tabular data are included.

18. HEUMANN, M. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago, University of Chicago Press, 1978. 228 p. (NCJ 46414)

A study of the process by which newly recruited defense attorneys, prosecutors, and judges adapt to the use of plea bargaining is presented. The experiences of both defense attorneys and prosecutors are traced from their recruitment through the final stages of their adaptation to the plea bargaining process. Their initial expectations--regarding court trials, the adversary relationship, and, for defense attorneys, the innocence of most of their future clients--are described. Their evolving perceptions of guilt and the development of their ability to distinguish among guilty defendants are examined. The discussion further considers the ways in which new attorneys first learn how to go about plea bargaining and how their opinions of its purpose, usefulness, and ethically change through different stages of experience. Important aspects of the decision to plea bargain, such as strength of the case, possible flaws in the evidence or police procedures, and caseload, are discussed. Judges, too, are conditioned to accept plea bargaining, and the process by which their adaptation occurs is analyzed as well. Judges' attitudes toward plea bargaining are often affected by their prior experiences as attorneys. An important distinction in a judge's adaptation to the procedure is that he does not actively participate. His role is reactive, and he acts more as an arbiter of the final decision. Judges also go through a period of learning to distinguish among guilty defendants, and this aspect of their adaptation is described. Several advantages to judges of accepting plea bargaining are discussed, including a savings of time and effort on their part and a reduction in the chances that their decisions will be reversed on appeal. Finally, the author presents his conclusions and their implications for plea bargaining reform. A summary of the adaptation process includes a recommendation that the training of attorneys include some preparation for the practice of plea bargaining. Excerpts from opinions by attorneys and judges regarding the positive and negative aspects of plea bargaining are presented, and the author's perceptions of its inevitability in our criminal justice system are explained. The fact is stressed that the practice is just as prevalent in courts with small caseloads as in those with a great deal of case pressure. Suggestions for a plea bargaining reform policy are presented, and recommendations are made for further research. Notes, a bibliography, and an index are provided.

19. HEY, W. Plea Bargaining: A Critique. Arlington, Texas, University of Texas, Arlington, 1975. 31 p. MICROFICHE (NCJ 29979)

Review of the reasons for and the different forms of plea bargaining, discussion of important court decisions impacting on this area, and a critical analysis of arguments in support of this practice. Some of the plea bargaining policies employed by different cities throughout the United States are also compared.

20. MARCUS, M. and R. J. WHEATON. Plea Bargaining: A Selected Bibliography. Washington, National Criminal Justice Reference Service, 1978. 38 p. MICROFICHE (NCJ 32329)

Annotated listing of law review articles, books, government documents, and other publications dating from 1956 through 1975, covering the legal aspects of plea bargaining, as well as its improvement and reform. How can the process of plea bargaining be improved? What are the respective roles of the defendant, the defense counsel, the prosecutor, judge, police, and the victim? What rules should govern the plea bargaining process? This bibliography contains documents that explore these questions as well as the legal aspects of plea bargaining. Although not a definitive search of the available literature, the 64 referenced documents (dated 1956 through 1975) cover Federal and state rules of procedure, factors influencing plea bargaining, a comparison between the American and English practices, advantages and disadvantages, and the present status of plea bargaining. All documents have been selected from the National Criminal Justice Reference Service data base. This annotated bibliography is arranged by author, and a subject index is provided. A list of the publishers' names and addresses appears in the appendix.

21. MARKOWITZ, J. Plea Bargaining: An Annotated Bibliography. Chicago, American Judicature Society, 1978. 57 p. (NCJ 54305)

Over 350 books and articles ranging in publication date from 1927 through 1978 are listed in a comprehensive, annotated bibliography on plea bargaining. An introductory overview of the status of plea bargaining in the United States observes that the predominant tone of the works cited is critical. The citations are arranged in 12 categories: (1) general discussions; (2) arguments for abolishing plea bargaining; (3) arguments for making plea bargaining more formal and open; (4) empirical studies of plea bargaining in the context of the entire criminal justice process; (5-7) the roles of the prosecutor, defense counsel, and judge in plea negotiations; (8) standards used by judges in deciding whether to accept guilty pleas; (9) the relation of the guilty plea and of plea negotiation to sentencing; (10) problems that arise when defendants regret their pleas, particularly when the expectation of a reduced sentence is not fulfilled by the court; (11) constitutional issues, particularly the problem of waiver rights; and (12) comments on judicial decisions pertaining to plea bargaining.

22. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS. Courts: Report of the National Advisory Commission on Criminal Justice Standards and Goals, 1973. Washington, 379 p. MICROFICHE (NCJ 10859)

Proposals for the restructuring and streamlining of the processing of criminal cases at State and local levels. A major restructuring and streamlining of procedures and practices in processing criminal cases at State and local levels is proposed by the National Advisory Commission on Criminal Justice Standards and Goals. The proposals of the Comsion appear in the form of specific standards and recommendations--almost 100 in all--that spell out in detail where, why, how, and what improvements can and should be made in the judicial segment of the criminal justice system. The report on courts is a reference work for the practitioner--judge, court administrator, prosecutor, or defender--as well as the interested layman. The Commission argues that the problems which keep the criminal court system from performing its functions are inconsistency in the processing of criminal defendants, uncertainty concerning results obtained, unacceptable delays, and alienation of the community. In composing suggested improvements for the court system, the Commission's first priority is to devise standards for attaining speed and efficiency in the pretrial and trial processes and prompt finality in appellate proceedings. The second priority is the upgrading defense and prosecution functions and the third priority is the assurance of a high quality in the judiciary. To expedite pretrial procedures, the prosecutor should screen all criminal cases and divert from the system all cases where further processing by the prosecutor is not appropriate. Among Commission recommendations are--elimination of all but the investigative function of the grand jury; elimination of formal arraignment; unification of all courts within each state; and the upgrading of criminal court personnel.

23. NEWMAN, D. J. Reshape the Deal. Trial, v. 9, n. 3:11-15. May/June 1973. (NCJ 10626)

In view of the controversy surrounding plea bargaining, a criminal justice professor explains plea bargaining practices and procedures, as well the motives of the defendant and the State for engaging in plea negotiation. Plea bargaining is a prearranged "deal" between the prosecution and the defense in which charges are dropped or where specific sentence promises are made in exchange for the defendant's willingness to plead guilty. Although plea negotiations are common in all jurisdictions in the country, legal scholars and social scientists became interested in the subject only during the 1960's when the American Bar Foundation studied plea bargaining practices. Although variations exist in types of plea agreements and procedures, a typical bargaining session can be described. Numerous considerations can arise in plea negotiations depending on the particular defendant, the crime or crimes charged, and the sentencing structure and practices of jurisdiction. Generally, guilty defendants favor plea bargaining because they want to minimize both the sentence and the label attached to it and also hope to avoid publicity. The State finds the bargained plea to be more efficient, cheaper, and more certain than a contested case. The State may hope to avoid challeges to the amount of evidence and the ways it was obtained, thereby avoiding controversial questions of police practices, prosecutorial trial skills, and the adequacy of legislative sentencing provisions. Other State considerations underlying plea negotiation that are less self-seeking are noted. Although the ethics of plea negotiation are continually debated, recent positions by legal organizations and appellate judges have been in favor of plea bargaining as a necessary and desirable part of American court practice. Unresolved issues about plea bargaining include (1) the range of plea bargaining, (2) equal opportunity to bargain, (3) "quick" justice, (4) the public's right to know, and (5) the corruption of ideology. References are included.

24. ROSETT, A. and D. R. CRESSEY. Justice by Consent: Plea Bargains in the American Courthouse. Philadelphia, J.B. Lippincott, 1976. 243 p. (NCJ 34418)

This book attempts to deal with issues surrounding the nature of plea negotiations, whether they serve justice, why they are so prevalent, and whether the system should be abolished. The dramatized, behind-the-scenes case of burglary suspect "Peter Randolph" is followed from his arrest through sentencing. The discussion of plea negotiation moves back and forth between the specifics of the guilty plea and the more general concern for official discretion in the criminal justice system. Since the process looks different to each of the participants--the accused, the judge, the prosecutor, and the defense lawyer--individual chapters provide different perspectives of the same experience, the prosecution in a State court of a routine burglary charge. The authors attempt to show that abolishing the plea bargaining system would be disastrous and that, in fact, the system is an effective way to improve the brand of justice provided in the written law. In addition, suggestions are made for making the system more impartial and responsive to community needs. An index is included. (Author abstract modified)

25. THOMAS, E. S. Plea Bargaining: Clash Between Theory and Practice. Loyola Law Review, v. 20, n. 2:303-312. 1974. (NCJ 14914)

The article critiques the practice of plea bargaining as contrary to the presumption of innocence and unlikely to be engaged in knowingly, intelligently, and voluntarily. In addition to the effects on the defendant, the author notes the problems for prosecutors and judges in current practice and in the ABA standards relating to pleas of guilty.

26. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Plea Bargaining in the United States. By W.F. McDonald, J.A. Cramer, and H.S. Miller. Washington, Georgetown University Institute of Criminal Law and Procedure, 1977. 45 p. MICROFICHE (NCJ 44633)

The major findings and policy-related conclusions of an assessment of plea bargaining practices in a representative sample of jurisdictions in 20 states are reported. The summary includes an overview of the extent and nature of plea bargaining in the jurisdictions surveyed, discussions of the roles of prosecutor, defense counsel, and judge in the plea bargaining process, and a review of policy implications. The study found that the size of the population may not be related to the extent to which plea bargaining is employed in a given jurisdiction. However, the data case is inadequate for arriving at generalizations with regard to this and other issues in plea bargaining. The study also found that the plea negotiation process generally is characterized by informality and low visibility. Trial courts exercise little real supervision. Victims tend not to play a key role in the process. Efforts to set standards for plea bargaining activities by prosecutors have given little attention to the problem of internal accountability within the prosecutor's office. It is pointed out that the prosecutor who seeks to abolish plea bargaining may succeed only in changing the locus of the process or in transforming explicit negotiations into implicit ones. Methods of ameliorating the observed defects of the process--e.g., initiating prosecutorial screening, establishment of cutoff points for accepting plea bargains--should be considered.

27. ________. Law Enforcement Assistance Administration. National Institute of Criminal Justice. Plea Bargaining in the United States, 1978. By H.S. Miller, W.F. McDonald, and J.A. Cramer. Washington, Georgetown University Institute of Criminal Law and Procedure, 1978. 443 p.
MICROFICHE (NCJ 40484)
Stock Order No. 027-000-00733-3

Report of a study of the nature and extent of plea bargaining in the United States, emphasizing its characteristics and dynamics. The report begins with a summary of the findings and conclusions. Following this is an overview of plea bargaining in the United States. Addressed in this chapter is the problem of defining plea bargaining, as well as the extent of its use. Various types of plea bargaining that were identified in the field are presented and described. The second chapter focuses on the role of the prosecutor. The issues of actual and legal innocence, prosecutorial discretion, screening, and plea bargaining are addressed. The role of defense counsel in the plea negotiation process and the conditions under which effective assistance can be provided to defendants are explored. Another section of the text analyzes the role of the judge as it pertains to judicial supervision of, and participation in, plea bargaining. Chapter 5 concerns the feasibility of a cost analysis of plea bargaining. An assessment of the practicality of determining the cost of plea bargaining in an overall system of case disposition is presented. The final chapter contains pertinent information on the methodological approach used in the study. The appendixes include information on the guilty plea rates of 20 states by jurisdictions and some forms that are used concerning plea bargaining. Also included is an extensive annotated and indexed bibliography. For the preliminary report of this program, see NCJ-40001. (Author abstract)

28. WELAJ, W. Guilty Pleas. Criminal Justice Quarterly, v. 2, n. 1: 24-37. Winter 1974. (NCJ 25277)

A discussion of the value of the guilty plea in the court process and an examination of the standards governing various aspects of the guilty plea. Such safeguards are seen to be: speedy dispositions; a reduction in court backload; and the limiting of the trial process to those cases in which the defendant has grounds for contesting the issue of guilt. The author states that since the plea of guilty entails the waiver of certain constitutional rights, such a plea should be subjected to comprehensive examination and attended by proper safeguards before it may validly be used to convict a defendant. The advantages of extensive use of the guilty plea are discussed in relation to determination of the voluntariness of the guilty plea, the determination of the factual basis for a guilty plea, withdrawal of a guilty plea, and raising the validity of a guilty plea in collateral proceedings.

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CHAPTER II—THE NATURE OF PLEA NEGOTIATION

29. ADELSTEIN, R. P. Plea Bargain in Theory: A Behavioral Model of the Negotiated Guilty Plea. Southern Economic Journal, v. 44, n. 3:488-503. January 1978.
(NCJ 52029)

A formal mathematical model of the plea negotiation process is specified to aid in resolving dilemmas associated with the constitutionality of negotiated pleas and pressures of the bargaining situation. Guilty pleas entered by defendants prior to trial in exchange for assurances of leniency in sentencing account for over 90 percent of all criminal convictions in the United States. The constitutionality of negotiated pleas is based largely on the question of whether pressures of the bargaining situation are such that innocent defendants might be persuaded to accept a preferred plea bargain and subject themselves to punishment for crimes they did not commit. The Landes model, which predicts that policy measures designed to provide counsel to defendants without cost to them will increase the proportion of trials demanded, is supported by statistical evidence of a positive correlation between legal expense subsidization for indigent defendants and the incidence of trials in U.S. District Courts. In relation to the Landes model, the initial decision as to whether to enter into negotiations at all or to insist upon a determination of guilt or innocence at trial is discussed. Associated bargaining outcomes preferred by prosecutors and defendants over the prospect of a full trial are examined, with the set of bargaining outcomes seen by both parties as preferred alternatives to trial given the existence of a contract zone. A dynamic model of bargaining behavior is presented that portrays the actual progress of plea negotiation itself and specifies the eventual outcome of negotiation in cases where there is a nonempty contract zone. The model represents a behavior approach and involves decision, expectation, and adjustment. It is suggested that the plea negotiation process may encourage results feared by the U.S. Supreme Court, since the introduction of time-related costs and their attendant incentives as significant factors in decisions of defendants to plead guilty to guilt or innocence. Endemic epistemological problems arise at the interface of law and social science and serve to delimit the relevance of formal economic analysis in many adjudicative settings. References are included, along with mathematical equations developed in the modeling process.

30. ARIANO, F. V. and J. W. COUNTRYMAN. Role of Plea Negotiation in Modern Criminal Law. Chicago-Kent Law Review, v. 46, n. 1:116-122. Spring/Summer 1969. (NCJ 30300)

Analysis of the problems and advantages of plea bargaining, with an emphasis on problems related to whether a guilty plea is entered voluntarily and with full knowledge of the consequences. Related issues discussed include the question of coercion and the possibility of influence exerted by the defense counsel in communicating the plea negotiation offer from the prosecutor to the defendant. The advantages of plea negotiation cited include efficient disposition of pending trials, the avoidance of public trial publicity in certain sensitive cases, its aid to prosecutors in bargaining for information leading to the conviction of others, and the theoretical psychological effect of any admission of guilt as a step toward rehabilitation.

31. BEQUAI, A. Prosecutorial Decision-making: A Comparative Study of the Prosecutor in Two Counties in Maryland. Police Law Quarterly, v. 4, n. 1:34-42. October 1974. (NCJ 16157)

Discussion of those factors which affect plea bargaining by prosecutors in Prince George's and Montgomery Counties. Some of the most important variables included age of both defendant and complainant, defendant's previous record, strength of the evidence, defendant's ability to adjust, and the complaining witness. Other factors considered are the sex of both complainant and defendant, the reputation of the defense attorney, and the education level and socioeconomic background of the defendant.

32. BALDWIN, J. and M. McCONVILLE. Negotiated Justice: Pressures To Plead Guilty. London, England, Martin Robertson and Company, Ltd., 1977. 144 p. (NCJ 46712)

The social and legal implications of inducing defendants to plead guilty in the interests of administrative efficiency is studied in the British court system. The evidence gathered from personal interviews with 121 defendants in the Birmingham (England) court system strongly suggests that many of the defendants who were either innocent or unlikely to be convicted were pressured by their defense counsel to plead guilty. While the lawyers' behavior is criticized, the main defects highlighted by the study lie in the structure of the legal process itself, primarily in the lack of adequate safeguards for the accused when under initial police interrogation and in the considerable reduction in sentence often given as an inducement to plead guilty. The authors maintain that the injustices encountered in their research are produced by a system which gives too little protection to the innocent and too often sacrifices the needs of the defendant to the requirements of bureaucratic efficiency. The results of this study were highly controversial, and were opposed by the British Bar. Notes and references follow each chapter. A bibliography and tabular data are included. Cited court cases are listed.

33. BOND, J. E. Plea Bargaining in North Carolina. North Carolina Law Review, v. 54, n. 5:823-843. June 1976. (NCJ 36793)

The article reports the findings of a survey of several of the district attorney's offices in North Carolina regarding plea bargaining practices. The results of the survey of 20 of the 30 district attorneys' offices in the State revealed that plea bargaining practices vary widely and indicated two broad areas. The first group, process problems, encompasses topics such as judicial participation in plea bargaining and imposition of different sentences. Some problems from the second group, internal management problems, include informal substantive bargaining policies and unstructured office negotiating procedures. The author concludes from his study that plea bargaining must be structured to facilitate rather than frustrate the purposes of the criminal justice system. An appendix contains the survey instrument used in the study and summarizes the responses received.

34. CORBETT, J. C. Plea Bargaining. Brooklyn Barrister, v. 26, n. 5:99-103. March 1975. (NCJ 55890)

Negotiation of pleas and discussion of possible sentences have valid functions in the administration of criminal justice, both in reducing the prosecutor's workload and protecting the defendant. Plea bargaining occurs primarily because of the recognition by criminal defendants of their guilt, and because of their desire to dispose of their cases on the best possible terms. Prosecutors are similarly anxious to reduce their extensive caseload and eliminate the uncertainties inherent in a jury trial. The prosecutor has the final acceptance of any plea, which may not be altered by the judge. Because a common practice of the police is to charge suspects with more serious crimes than may have actually occurred, the prosecutor's acceptance of a plea to a lesser offense serves the interests of justice. Additionally, prosecutors themselves frequently indict a defendant for a higher degree of crime than was actually committed, and then reduce the complaint to accomodate a guilty plea and to end the possibility of an acquittal. Several examples of plea bargaining situations in the New York City court system are provided. These examples demonstrate the toleration of plea bargaining as a means of sorting out cases which have been overcharged, and encouraging the swift administration of justice according to the desires of all parties.

35. COUSINEAU, D. F. and S. N. VERDUN-JONES. Setting Standards for Canadian Criminal Courts: The Case of Plea Bargaining. Canada, Simon Fraser University, Department of Criminology, 1977. 216 p. (NCJ 44443)

The document addresses many of the important issues associated with the guilty plea and with plea bargaining to determine the feasibility of establishing standards. The report includes 32-page working paper on standards for juvenile court prepared by Chris Schmaling. The study assembles standards articulated by major projects both in the United States and Canada. The legal principles developed by Canadian courts in relation to guilty pleas and plea bargaining are analyzed, and the ethical standards developed in this area by professional groups are examined. An overview of empirical research on plea bargaining is provided. The text discusses the legal principles relating to plea bargaining in other jurisdictions--notably the United States and Great Britain. Various arguments made for and against plea bargaining are presented and related to relevant empirical data. Various forms of plea bargaining suggested by the literature are identified. The document comments on the concrete methods which may be analyzed in the implementation of any standards developed in this area. An appendix provides standard setting projects; standards of the National Advisory Commission on Criminal Justice System and Goals, 1973; the Canadian Bar Association Code of Professional Conduct, 1974; American Bar Association Standards Relating to Guilty Pleas, 1968; the Ontario Law Reform Commission Report on Administration of Courts, 1974; and Uniform Rules of Criminal Procedure, National Conference of Commissioners on Uniform State Laws, 1974. (Author abstract modified)

36. DECKER, S. H. Judicial Process in a Rural Context. In Margaret Evans, Ed., Discretion and Control, Beverly Hills, California. Sage Publications, 1978. 14 p. (NCJ 52546)

A study was conducted in Pine County, Ind., to determine whether plea bargaining exists to the same extent and for the same reasons in rural courts as in urban courts and whether "outsiders" receive more severe sentences. It is suggested that smaller criminal justice agencies have been neglected in criminological research and that their study can help criminologists determine which features of urban courts are endemic only to urban settings and which are consistent features of all criminal justice systems. Pine County has a population of 26,032; the county seat has 8,852 residents. Data for the plea bargaining study were drawn from direct observation of court proceedings and from detention facility records. Results indicated that rural courts suffer from a lack of resources, just as urban courts do. The Pine County Criminal Court meets twice a week and averages about 88 hours of operation per week. During the 3 months of observation, the judge heard a total of 347 cases, an average of 10.8 per day. Of these, 183 or 53 percent involved a negotiated plea. Public defenders represented 40 percent of the clients and bargained pleas in 75 percent of cases. These figures are similar to those found in urban studies. The use of plea bargaining was increased by the proximity of the police and corrections agencies and by an informal consensus among all branches of the county criminal justice system regarding the proper disposition of cases resulting from their informal personal interaction. The study also showed that nonresidents of the county were more likely to be sent to jail than residents were, but this difference disappeared when the seriousness of the offense was considered. The decision to jail a suspect was based on felony/ misdemeanor grounds rather than on an offender's residential status. Since the majority of felonies are committed by outsiders, their incarceration is actually a response by the local criminal justice system to the seriousness of an offense. It is concluded that, as in urban areas, legal factors are the best predictors of disposition. Tables present study data, and references are appended.

37. EWING, D. Juvenile Plea Bargaining: A Case Study. American Journal of Criminal Law, v. 6, n. 2:167-191. May 1978. (NCJ 50059)

Various aspects of juvenile plea bargaining are examined, including forms of plea bargaining and the role of the attorney. A case study in juvenile court stipulations is also provided. The history of juvenile plea bargaining is noted briefly, followed by an assessment of the problem of stipulations in juvenile courts. A general view of plea bargains is presented with attention to the definition of bargains themselves and court action endorsing their application to juvenile adjudication. The similarity and dissimilarity in the procedures employed in juvenile and adult stipulations are noted, along with typical forms of bargains and the usual format for accepting the necessary waiver. The role of the defense counsel in the plea bargaining process is also discussed in light of the Supreme Court's ruling in the Gault case. A case study of the stipulation procedure utilized in the Harris County, Tex., juvenile courts is provided. Stipulating in the county is a formulating ritual and usually results in the disposition of the case in less than 10 minutes, waiting time not included. The advantages which juvenile defense counsels gain for their clients by plea bargaining are discussed, including the reduction of a delinquent child petition to a child in need of supervision petition. After arguments stressing the need for an established factual basis for guilt, the effectiveness of hearing rights waivers is discussed, with emphasis on voluntary and knowing waivers (waivers voluntarily consented to by a juvenile capable of understanding the scope and function of both the hearing right and the waiver process). It is concluded that defense attorneys, prosecutors, and judges in the county have grown complacent with respect to the use of stipulations in juvenile adjudication. It is recommended that prosecutors begin investigating individual cases more systematically, that judges reassert their control over the stipulation process, and that defense attorneys assume more responsibility to ensure that their clients receive true benefits from a stipulation. A breakdown of county stipulations by age, race, and offense is appended. Judicial decisions and other references are footnoted.

38. FERGUSON, G. A. and D. W. Roberts. Plea Bargaining: Directions for Canadian Reform. Canadian Bar Review, v. 52, n. 4:497-576. December 1974. (NCJ 35608)

Description of the important aspects of the practice of plea bargaining in the Canadian criminal process and discussion of its advantages and disadvantages. Cases demonstrating the variation in plea bargaining practices are outlined. Police plea bargaining is discussed and the advantages and disadvantages of prosecutorial plea bargaining to the prosecution, defense, defendant, and society in general are examined. Directions for reform are suggested.

39. FINKELSTEIN, M. O. Statistical Analysis of Guilty Plea Practices in the Federal Courts. Harvard Law Review, v. 89, n. 2:293-315. December 1975. (NCJ 31125)

The article analyzes guilty plea statistics from various Federal district courts and concludes that the fundamental assumption underlying the Supreme Court's approval of plea bargaining is incorrect. The U.S. Supreme Court has explicitly approved the practice of plea bargaining but only on the assumption that defendants who were convicted on the basis of negotiated pleas of guilt would have been convicted had they elected to stand trial. The author argues that prosecutors may be using threats of lengthy sentences and other plea-inducing practices to obtain convictions in cases in which the government's evidence is quite insubstantial. Developing a concept called the "implicit rate of non-conviction," the author concludes that more than two-thirds of the marginal plea bargain defendants would be acquitted or dismissed were they to contest their cases. (Author abstract)

40. GRAY, K. D. Negotiated Pleas in the Military. Federal Bar Journal, v. 37, n. 1:49-60. Winter 1978. (NCJ 55075)

The application of the plea negotiation process in the military, particularly in the U.S. Army, is discussed, and guilty plea procedures and pretrial agreements are considered. In 1953, use of the pretrail agreements were recommended to relieve overcrowded dockets of contested cases in the U.S. Army. Implementation of the plea bargaining process was left to the discretion of various court martial authorities. As a result of the use of pretrial agreements, negotiated pleas are as common in the military as they are in civilian criminal jurisdictions. Deciding how to plead is one of the most important decisions the accused person must make in the court martial process. A pretrial agreement represents a contract between the convening authority and the accused person in which the accused agrees to plead guilty in return for the authority's promise to approve a specified amount of punishment. Once preliminary negotiations are completed and the authority has agreed to the accused's offer to plead guilty, an agreement must be put in writing. In the first part of an agreement, accused persons acknowledge that charges and evidence have been examined by them and defense counsel, that they have consulted with counsel, and that they will plead guilty after being fully advised of legal and moral rights to plead not guilty. In the second part of an agreement, sentence limitations agreed to by the authority in return for the accused person's plea of guilty are specified. Procedures for negotiating pretrial agreements in the military are markedly different from the civilian plea bargaining process. Judges do not participate in the military negotiation process, while they actively participate in some civilian jurisdictions. Before a plea of guilty can be accepted, military judges must conduct a detailed and explicit inquiry of the accused concerning a plea. This procedure is referred to as the providency inquiry and is conducted by military judges outside the presence of court members. Trial judges are required to share in the responsibility for assuring that the accused has entered into a proper agreement with the convening authority. They must collaborate with appellate courts in monitoring terms of pretrial agreements to ensure compliance with statutory and decisional law and adherence to basic concepts of fundamental fairness. Pretrial agreements are essential to the administration of justice, and a negotiated plea in the military that has been voluntarily and providently entered by the accused person guarantees benefits derived from a sentence-limiting agreement. Case law is reviewed.

41. HARTNAGEL, T. H. Plea Negotiation in Canada. Canadian Journals of Criminology and Corrections, v. 7, n. 1:45-56. January 1975. (NCJ 19788)

Examination of the impact of previous arrest record, repetitious counts or multiple charges, and type of offense committed on plea negotiation. In addition to these legally relevant factors, the extra-legal variables of representation by defense counsel, occupational status, and racial origin were introduced into the analysis. Included are statistical tables presenting the results of the study.

42. HEUMANN, M. Note on Plea Bargaining and Case Pressure. Law and Society Review, v. 9, n. 3:515-528. Spring 1975. (NCJ 29605)

This note analyzes the relationship of plea bargaining to case pressure by examining Connecticut court statistics from the 1880's to the present to determine if variations in case pressure affect the trial rate. It is observed that the heavy caseloads of criminal courts are often coupled with observations of the prevalence of plea bargaining so as to suggest that plea bargaining is an expedient developed to manage excessively large caseloads. To test this assumption, the author reviewed data from published State of Connecticut reports and interviewed 71 individuals working in Connecticut's criminal justice system. Statistics on guilty pleas for the years 1966-1973 are first presented: they show that in not one of the 7 years analyzed did the ratio of trials to total dispositions exceed 9 percent. Data on the ratio of trials to dispositions are then presented for the years 1880-1954. It was found that the mean percentage of trials for this 75-year period was 8.7 percent. The author concludes that trials, as far back as 1880, did not serve as a frequent source of case dispositions. Caseload data from 1880-1954 are then reviewed for the nine Connecticut superior courts. The author found that courts with low case pressure did not appreciably differ in the percentage of trial cases when compared to high case pressure courts. Even during the period of 1970-1973, courts which experienced significant decreases in case pressure did not increase the percentage of cases brought to trial. The author concludes that plea bargaining cannot be explained merely as the product of case pressure, but also as a strategic move on the part of prosecution and defense. (Author abstract modified)

43. HOANE, A. Stratagems and Values: An Analysis of Plea Bargaining in an Urban Criminal Court. Doctoral Dissertation, New York University, New York, 1978. 428 p. (NCJ 56226)

Observations and interview material from a field study of a New York City, N.Y., Misdemeanor Court are the basis of an analysis of plea negotiation practices in urban settings. An anthropological interpretation of the basic processes and structures of criminal courts in the United States provides a foundation for understanding the study court's organization, characterizes the American system of criminal law, and points out the ritual role and basic autonomy of the legal process. The caseload problem and plea bargaining practices of the study court are described. A discussion of plea bargaining as a power struggle shows how plea bargaining retains the adversary structure of the traditional legal system. A strategic analysis of relationships among defense lawyers, prosecutors, and judges within this structure is offered. Values and principles underlying plea bargaining are explored by examining factors that count for or against defendants in plea conferences. The connection between plea bargaining and society is brought out, and plea bargaining is compared with legal systems in other societies and with the formal legal system in the United States. The influence of the medical model and its ambiguities on plea negotiation is considered. The common beliefs that caseload pressures cause plea bargaining and that attorneys and judges collaborate in plea bargaining are borne out by the study. However, it is also shown that caseload pressures are to some extent artificially increased by court administrators, and that collaboration among defense attorneys, prosecutors, and judges is interwoven with conflict. Not only do these participants represent conflicting interests, they themselves have conflicting interests in controlling the case settlement process. The study also shows that characterizing criminal courts as bureaucracies is an oversimplification. A consideration of the social function and organization of the courts, the values and principles of plea bargaining, uncertainty in plea bargaining, and causes of plea patterns provides a more comprehensive picture. The findings suggest that reformers need to consider what is valuable about plea bargaining and what is not. Plea bargaining debases the law-upholding function of the court and grants inordinate power to prosecutors. But it also is a dispute settlement procedure in which standards reflecting appropriate social and moral concerns are applied in judging defendants. A list of references is included. No tabular data are provided.

44. JONES, J. B. Prosecutors and the Disposition of Criminal Cases: An Analysis of Plea Bargaining Rates. Journal of Criminal Law and Criminology, v. 69, n. 3:402-412. Fall 1978. (NCJ 51106)

The effect of prosecutors' values and social background on their rate of plea bargaining was examined based on data collected through a mail survey of prosecuting attorneys and their assistants in Illinois. The survey instrument (not provided) contained both open-ended and closed questions focusing primarily on the prosecutors' plea bargaining practices and their view on these procedures. Responses to a question on rate of plea bargaining provided the dependent variable for the study. Prosecutors were requested to indicate the percentage of their cases which were resolved through the use of a negotiated plea; the dependent variable was based on their perception of the plea bargaining rate. The three independent variables included two background considerations, education and experience, and the prosecutors' support for organizational values existing within the criminal court environment. These variables were applied to four hypotheses: (1) prosecutors from lower class ethnic and religious minority groups will engage in plea bargaining at a higher rate than their colleagues from nonminority and middle and upper class background; (2) prosecutors who received their education from one of the proprietary law schools will engage in plea bargaining at a higher rate than their counterparts from nonproprietary schools; (3) prosecutors with more legal background will engage in plea bargaining at a higher rate than those with less experience; and (4) prosecutors who adhere most strongly to values such as efficiency and cooperation will engage in plea bargaining at a higher rate than those who support such values less strongly. The statistical analysis demonstrated that knowledge of the prosecutor's religion, national origin, or family status was not useful in predicting the plea bargaining rate; that reality often overrides law school values and perceptions, causing a prosecutor's legal training to have little effect on the plea bargaining rate; that depth of legal experience has almost no influence on a prosecutor's willingness to negotiate; and that support or nonsupport for efficiency has no effect on plea bargaining rate, although support for cooperation has a somewhat greater effect on the frequency of prosecutorial bargaining. Graphs and tabular data are provided. References are footnoted.

45. KINGSNORTH, R. and L. RIZZO. Decision-making in the Criminal Justice Courts: Continuities and Discontinuities. Criminology, v. 17, n. 1:3-14. May 1979. (NCJ 57978)

The relationship between plea bargaining and the sentencing recommendations of probation officers is explored in a study of the disposition of 302 felony cases plea bargained in a Superior Court. Judges concurred with the probation officers' sentencing recommendations in 93 percent of the cases. A "no state prison" guarantee was offered during plea negotiations in 42 percent of the cases. Probation officers recommended against imprisonment of 97 percent of these cases, compared to 76 percent of the cases in which a guarantee was not offered during negotiation. Judges generally rejected the sentencing recommendations of probation officers when the recommendations were in conflict with a negotiated agreement regarding imprisonment. The findings indicate that the autonomy of probation officers in 40 percent of the negotiated cases was severely eroded by pressures on the officers to function within the constraints imposed by plea negotiations. The most potent influence on probation officers to tailor their recommendations to fit bargaining agreements is the judiciary. Committed to managerial efficiency within the court system, judges assert the primacy of plea bargaining agreements over sentencing recommendations when these are in conflict rather than permitting the withdrawal of a guilty plea and the return of the case to the bargaining stage. The policy implications of these findings depend on the legitimacy accorded the concept of individualized justice and offender treatment, of which presentence investigations are an important tool. A list of references and a flowchart depicting the disposition of the study cases are included. N. tabular data are provided.

46. KIPNIS, K. Criminal Justice and the Negotiated Plea. Ethics, v. 86, n. 2:93-106. January 1976. (NCJ 36909)

This philosophical examination questions the intrinsic fairness of plea bargains, particularly in light of the element of defendant duress, and critically examines the place of such bargains in the criminal justice system. The author contends that in its coercion of criminal defendants, its abandonment of desert as the measure of punishment, and its relaxation of the standards for conviction, plea bargaining falls short of the justice expected of the American legal system.

47. KLEIN, J. F. Inducements To Plead Guilty: Frontier Justice Revisited. In P. Wickman and P. Whitten, Readings in Criminology. Lexington, Massachusetts, Heath Lexington Books, 1978. 15 p. (NCJ 46552)

Canadian offenders' perceptions of tactics used by officials to induce them to plead guilty when they might otherwise have been inclined to take their chances with a trial are discussed. One tactic cited by offenders is the practice of offerring to dismiss charges against a female in exchange for a guilty plea from a male (or threatening to arrest and charge the female if the guilty plea is not entered). Another tactic is the threat to charge the accused as a habitual criminal unless he pleads guilty. A third approach, particularly common with native offenders in Canada, is to capitalize on an offender's fear or ignorance. Because an offender often is not credited for time served in custody while awaiting trial, the threat of having to serve a protracted period of "dead time" can also be used to extract a guilty plea. Overcharging--charging the accused in such a way that he thinks he may receive a sentence more severe than the sentence normally given for the act he has committed--may also serve as an inducement for the accused to plead guilty to a seemingly lesser, but in fact normal, charge. Quotes from offenders who were interviewed about their plea-bargaining experiences are included.

48. KLONOSKI, J. and C. MITCHELL. Plea Bargaining in Oregon: An Exploratory Study. Oregon Law Review, v. 50, n. 2:114-137. Winter 1971. (NCJ 05160)

An analysis of questionnaires returned by Oregon district attorneys on their practices of plea bargaining. Plea bargaining, as revealed in this survey, is extensive in Oregon, slightly more so in the large counties. Most district attorneys will usually plea bargain, except perhaps in those criminal areas which arouse a strong revulsion on the part of the public, such as crimes involving violence. In Oregon, participants in the plea bargaining process are usually the prosecutor and defense attorney, although judges and defendants are occasionally involved. Main controversies concerning the role of the participants include questions such as—Should the district attorney initiate plea bargaining? Does a lawyer's style affect subsequent outcomes in plea bargaining? Is it proper for the defense counsel to withhold information in plea bargaining? Should the judge discuss sentencing? As to all the above questions, there was no consensus among prosecutors. Benefits from the plea bargaining process are substantial. Much money and time are saved and the accused also benefits in that he may be protected from adverse publicity or obtain a reduced charge which lacks social stigma and the possibility of a heavy maximum penalty. On the other hand, the disadvantages are also numerous. The method of payment of court-appointed attorneys may affect their disposition toward plea negotiations. Young, inexperienced attorneys might stretch out cases to gain courtroom experience to the detriment of their clients. Through fear and lack of understanding, the defendant could fail to comprehend the full consequences of his guilty plea. And, finally, the community interest may suffer from criminals being turned prematurely back into the community by overworked district attorneys.

49. KRAY, F. and J. BERMAN. Plea Bargaining in Nebraska: The Prosecutor's Perspective. Creighton Law Review, v. 11, n. 1:94-149. October 1977. (NCJ 52829)

Plea-bargaining practices in Nebraska are analyzed, with reference to a survey of county prosecutors, and suggestions for ensuring consistency in concessions offered in exchange for guilty pleas are presented. Due process requirements for the acceptance of guilty pleas are discussed. The concept of the voluntary and intelligent plea as developed by the U.S. Supreme Court is compared with Nebraska law, which generally has relied on the American Bar Association's guilty plea standards. The impact of judicial acceptance of plea bargaining is also considered. It is concluded that the safeguards developed by the Supreme Court do little to limit prosecutorial discretion in plea negotiation. Examination of the responses of 62 of Nebraska's 93 county attorneys to a questionnaire survey reveals that plea bargaining is a widespread practice, accounting for 30 to 60 percent of the prosecutor's caseloads. Rural prosecutors bargain as often as their urban counterparts. Prosecutors have essentially unbridled discretion in plea negotiation. Most offices have no formal rules for bargaining, although there appears to be some consensus regarding factors to be considered in deciding whether to bargain (the nature of the crime, strength of the case, and interests of justice). Boundaries between ethical and unethical behavior (overcharging, initiating negotiations, withholding evidence from defense counsel during bargaining) seem vague. Prosecutors note a difference in the bargaining approaches of privately retained counsel, appointed attorneys, and public defenders. The vast majority of respondents feel that plea bargaining serves the interests of justice. In light of the uncertainty regarding the effects of abolishing plea bargaining, a model for improving plea-bargaining practices is outlined. The model, which is based on a numbering system used in sentencing in El Paso and Belton, Tex., quantifies certain factors in plea bargaining (nature of the crime, aggravating circumstances, the defendant's criminal record, number of counts charged) and sets forth guidelines relative to sentence recommendation, charging, the decision to negotiate (charge reduction, count reduction, consultation), and disclosure of the plea agreement in court. A description of the El Paso-Belton numbering system is appended.

50. KUH, R. H. Plea Bargaining: Guidelines for the Manhattan District Attorney's Office. Criminal Law Bulletin, v. 11, n. 1:48-61. January/February 1975. (NCJ 16282)

Memoranda indicating the powers of assistant New York City district attorneys in plea negotiations and some standards for their application. Richard H. Kuh, when serving as district attorney for Manhattan, issued guidelines to his staff for conducting plea bargaining. These guidelines are reproduced in this article in their original memorandum format. The six sections deal with general principles governing plea negotiations, defendants charged with multiple crimes, reduction of felonies, a prepleading report (analogous to a presentence report), procedure in court, and reduced pleas concerning certain specific crimes. In New York County, plea bargaining starts with a provable defense, not necessarily the crime originally charged. The assistants are permitted to reduce a charge one class (from a class A felony to a class B felony, for instance) and a further reduction is permissible after consultation with appropriate superiors. If a reduction of more than one class is sought, the defendant must agree to a prepleading report. This report allows both prosecution and defense to engage in informed plea bargaining and can serve as the basis for the statement in support of accepting the lesser plea which the assistant must enter on the court record. While this memo is based on New York law and court practices, it is an interesting example of one prosecutor's efforts to establish uniformity and serve the best interests of justice in this important area.

51. LACHMAN, J. A. and W. P. McLAUCHLAN. Models of Plea Bargaining. In S. S. Nagel, Modeling the Criminal Justice System. Beverly Hills, California, Sage Publications, 1977. (NCJ 43261)

Current research into the plea bargaining process, which presently accounts for approximately 90 percent of case dispositions in urban criminal courts, is assessed. Plea bargaining, in which the defendant agrees to plead guilty in return for favorable consideration such as a reduced charge or reduced sentence, is usually practiced during whispered consultations between defense and prosecution just before the case is heard in court. However, some states have institutionalized the procedure by allowing scheduled conferences at which the matter is discussed by the defendant, his attorney, and the prosecutor. Plea bargains are encouraged because they conserve court resources; some feel that the admission of guilt is the first step toward rehabilitation; and defense attorneys know that a guilty person who insists on a trial may be viewed as a troublemaker and receive a more severe penalty than if a plea bargain had been made. Several attempts have been made to construct models of the negotiated settlement process, but to date these have either been too complex or so simplified as to not reflect the real world. The works of Freedman (1960), Ross (1970), and Johnston and Tersine (1973) attempt to explain the process in terms of benefits to each side. Posner (1973) highlights the cost savings. Landes (1971) studies the psychological factors behind a demand for a trial. Lachman (1975) found a relationship between court resources and number of cases on the docket. All assume that the goal of the prosecutor is to obtain convictions and reduce crime levels. Future models should concentrate on the dynamics over time, the likelihood of winning at trial (which in the present models is assumed constant), and the conflicting goals present in real plea bargaining situations. References are provided.

52. MAYERSON, H. Copping Out: The Plea Bargain. Columbia Human Rights Law Review, v. 8, n. 2:49-57. Winter 1977. (NCJ 50876)

Plea bargaining is defined and its uses and procedures are described. Emphasis is on informing the defendants of rights and options in a plea bargaining situation. It is stated that the New York criminal justice system is geared toward making a person plead guilty, so that plea bargaining is a natural tactic that works well within the systems. The defense counsel is an important factor in plea bargaining, and a person who cannot afford a private attorney will be assigned one from legal aid or the appellate division panel. The district attorney and the judge are also important figures in the plea bargaining process, and defendants should attempt to gather information on the type of judge and district attorney that they will be dealing with at the time of the initial arraignment and first interview with the counsel. Bail setting is a significant procedural step; the accused persons out on bail should enroll in school, obtain psychiatric treatment, or involve themselves in some other form of positive behavior at this time in order to assist their attorney in the defense strategy. It is stressed that defendants must reveal any former offense records to their attorney. The problems arising from a prior offense record are discussed in conjunction with the arraignment stage at which plea bargaining is most often decided. New York State law prohibits persons convicted of a felony within the last 10 years from plea bargaining. The defendant has a second chance to plea bargain at the preliminary hearing. At this stage the accused person can be indicted, and in that case the person should check the statutes under which the indictment was made and those governing plea bargaining in similar cases. After arraignment on indictment, the plea bargaining process starts again in the trial court; often the promise of a certain sentence is involved. Methods that can improve the defendant's position at this stage are discussed.

53. McDONALD, W. F., J. A. CRAMER and D. DENNO. National Study of Plea Bargaining in the United States: Preliminary Report on Phase 1. Georgetown University Law Center, 1976. 239 p.
MICROFICHE (NCJ 40001)

Tentative report providing information about an analysis of plea bargaining relevant to the formulation of national policy. This preliminary report by the Institute of Criminal Law and Procedure, Georgetown University Law Center, is subject to revision in the final report. The authors present the data gathered so far toward the goal of describing the variety of plea bargaining systems that exist across the country. The methodology employed was on-site interviews of judges and other court personnel at 20 jurisdictions of over 100,000 population selected through stratified random selection. Interview data, statistical data, and observational data are analyzed. Specific topics covered are the judicial role in plea bargaining, the predictability of sentence after a guilty plea, sentencing differentials between those arising from guilty pleas and those imposed after trial and types of plea bargaining in the 20 jurisdictions. Appendixes include a comprehensive annotated bibliography of over 350 references related to plea bargaining. The references include published and unpublished books, pamphlets, periodicals, government publications and articles. The bibliography in the final report will be indexed. A 50-page feasibility study for a cost analysis of plea bargaining is also included.

54. MENDES, R. G. and J. T. WOLD. Plea Bargains Without Bargaining: Routinization of Misdemeanor Procedures. In W. B. Saunders and H. C. Daudistel, Criminal Justice Process: A Reader. New York, Praeger Publishers, 1976. 16 p.
(NCJ 34975)

Analysis of the plea bargaining process in Division 81 of the Los Angeles municipal court focusing exclusively on misdemeanor negotiations conducted in a highly formalized system. The recent history of Division 81 and its setting in the court system is described. The significant features of misdemeanor plea bargaining are examined and the roles of various participants assessed. Information was obtained through in-depth interviews and direct observation in addition to a limited amount of aggregate material available from Division 81 internal records. Findings indicate that the plea bargaining system in Division 81 may indeed deter or reform many misdemeanants, providing a service to the community.

55. NAGEL, S. S. Plea Bargaining, Decision Theory, and Equilibrium Models, Part 1. Indiana Law Journal, v. 51, n. 4:987-1024. Summer 1976. (NCJ 38673)

A descriptive mathematical model of plea bargaining is developed based on assumptions that defendants want to minimize sentences and their likelihood of conviction while prosecutors normally want to maximize them. Decision theory and equilibrium modeling are used to create matrices showing how a defendant and a prosecutor in a hypothetical case each views the most likely sentence if (a) the defendant pleads guilty before a judge in a non-negotiated plea when his probability of being convicted (or PC) is relatively near zero, (b) the defendant pleads guilty before a judge when in a non-negotiated plea the probability of his being convicted is relatively near 1.0, (c) the defendant goes to trial when his probability of conviction is zero, and (d) the defendant goes to trial when his probability of conviction is 1.0. The cell entries show likely sentences in terms of years for a crime that allows for at least as much as 10 years in prison, which would mean a major felony case. A discussion of optimum strategies or bargaining limits considers the role of benefits and costs other than sentence years, such as the saving of time, money, and reputation. (Author abstract)

56. NAGEL, S. S. and M. NEEF. Plea Bargaining: Decision, Theory, and Equilibrium Models, Part 2. Indiana Law Journal, v. 52, n. 1:1-61. Fall 1976. (NCJ 40251)

Second of two articles developing and demonstrating models to indicate when, why, and at what point an out-of-court settlement is likely to occur in plea negotiations, as well as likely alternatives to settlement. The equilibrium models, developed in the first article along with the general theory, view the defendant as the buyer and the prosecutor as the seller in a plea bargaining situation. Each enters into the bargaining process with a rough notion of how high or low they are willing to go before turning to the trial alternative. This article applies the equilibrium models to the defendant and the prosecutor in both a general situation and in situations involving special conditions concerning the defendant's strategies toward the alternative and both parties' degree of knowledge of the contingent probabilities. Appendixes listing terms and formulas used are included at the end of this article. For Part 1, see NCJ-38673. (Author abstract modified)

57. NARDULLI, P. F. Plea Bargaining: An Organizational Perspective. Journal of Criminal Justice, v. 6, n. 3:217-231. Fall 1978. (NCJ 52453)

A microlevel analysis of factors affecting the decision to plead guilty in felony trial courts of Chicago, Ill., during 1972 and 1973 is presented. Guilty pleas have been the dominant mode of conviction in most state criminal courts. Because plea bargaining is widespread and due to its potential for abuse, the plea bargaining process as used to obtain most guilty pleas has been the subject of much discussion. Chicago's felony court system is viewed from an organizational perspective, and guilty pleas are analyzed in light of the role they play in the court organization's overall design for handling its workload (dispositional strategy). Criminal courts in the city are dominated by an elite involving judges, prosecutors, and defense counsel. This domination emphasizes the expeditious handling of cases. While internal factors, interests of the elite, are important, environmental considerations are also significant. The notion of coalignment between internal and external (environmental) factors is crucial to an organizational perspective on criminal court operations. It has implications for how each task involved in processing criminal cases, including charge initiation, screening, conviction procurement, and sentencing, is structured. No information was available to evaluate the psychological dimension in the decision to plead guilty. Two situational indicators were employed concerning the number of other indictments pending against the defendant and the defendant's arrest record. Socioeconomic status was employed as the economic indicator. Judge, prosecutor, and defense counsel responsiveness to plea bargaining and defendant perceptions of the chance for ultimate conviction were assessed. It appeared that the plea bargaining process was not entirely irrational, but extraneous factors seemed to affect it in a manner that cast serious doubts on its value as a dispositional technique. Most of these extraneous factors appeared to be related to the fact that the structure of the dispositional process in Chicago is strongly influenced by a coalition of influential actors who have merged their discretionary powers in an attempt to effect common interests. Supporting data and references are included.

58. REBROVICH, K. G. Factors Affecting the Plea Bargaining Process in Erie County (NY): Some Tentative Findings. Buffalo Law Review, v. 26, n. 4:693-711. Fall 1977. (NCJ 54978)

Direct observation of 88 plea bargaining sessions and interviews were used to identify the factors affecting the plea bargaining process in the Erie County, N.Y., district attorney's office. Recommendations are made. It was found that the typical bargaining session lasted 5 to 10 minutes and consisted of the district attorney and the defense attorney exchanging offers. In 75 percent of the instances in which the police officer or the victim were present, these persons were either addressed directly by the district attorney or else "voluntary" statements were acknowledged. (Departmental rules forbid a police officer from changing a charge, but various methods were used to indirectly elicit an opinion from the officer.) Statistical analysis measure the relationship between the following four variables and the resulting plea bargain: (1) the particular district attorney doing the negotiating, (2) presence of the police officer at the plea discussion, (3) presence of the victim, and (4) whether the defense attorney was a public defender. Although the small sample does not make statistical validity possible, it was found that various district attorneys arrived at widely differing pleas in similar cases. District attorneys were also reluctant to accept a plea if the police officer was not present. However, degree of reduction of charge was not affected by the presence of the police officer. Private defense attorneys in this sample never went to trial and frequently had their cases adjourned, while the opposite was true for public defenders. Reasons for this are examined. It is recommended that law students or clerks be used to give the district attorney greater knowledge of the case before plea bargaining and that standards be drawn up. Tables presenting study data and footnotes are included.

59. RHODES, W. M. Economics of Criminal Courts: A Theoretical and Empirical Investigation. Journal of Legal Studies, v. 5, n. 2:311-340. June 1976. (NCJ 39428)

In his economic analysis of the courts, Landes showed that plea bargaining can be characterized as a market transaction in which the prosecutor "buys" guilty pleas in exchange for promises of sentence leniency. This paper develops and extends Landes' model to clarify the relationship between individual decisionmaking and the overall mechanics of the criminal courts. A general equilibrium theory is developed to account for the influence that the relative bargaining strengths of the defendant and prosecutor have on (a) the number of prosecutions and (b) the use of plea bargaining rather than trials to dispose of criminal cases. To analyze the bargaining between the defendants and prosecutor, some mathematical notation is introduced initially, followed by assumptions about the prosecutor's behavior. Among these assumptions is a specification of the prosecutor's objective function, which he maximizes subject to a budget constraint and the defendant's aggregate demand for trials. This maximization problem is specified, first-order conditions for a constrained maximum are derived and interpreted, and first-order conditions are differentiated to determine the effect the prosecutor's budget, the availability and quality of legal aid to indigent defendants, court delay, and bail policy have over the disposition of cases in the criminal courts. It is shown that the disposition of cases in the criminal courts depends on the prosecutor's budget and the relative cost of trials for the defendants. The empirical counterparts of these theoretical constructs are specified in two hypotheses and tested using data collected from U.S. district courts and Minnesota courts. The disposition hypothesis states that, generally, the total number of prosecutions, and the resulting number of guilty pleas and trials, are functions of the budget constraint imposed on the prosecutor and the cost of a trial relative to a settlement for the defendant. The sentencing hypothesis states that, other things being equal, the defendants' demand for trials is inversely related to the plea bargaining concessions exchanged for negotiated settlements. Therefore, the ratio of settlements to trials varies directly with the leniency of the sentence exchanged for guilty pleas. Both hypotheses are tested using multiple linear regression analysis where data made this method appropriate, or a T-test to determine the statistical significance of observed differences in dispositions and sentencing between two judicial districts. Statistical results supported both hypotheses. (Author abstract modified)

60. ROTENBERG, D. L. Progress of Plea Bargaining: The ABA Standards and Beyond. Connecticut Law Review, v. 8, n. 1:44-87. Fall 1975.
(NCJ 32777)

Examination of the extent to which the standards have influenced the law and practice of plea bargaining in several states and of the adequacy of the standards as a basis for a comprehensive guilty plea system. The five states selected for analysis were Arizona, Connecticut, Michigan, North Carolina, and Wyoming.

61. SCHOENFELD, C. G. Psychoanalytic Approach to Plea Bargains and Confessions. Journal of Psychiatry and Law, v. 3, n. 4:463-473. Winter 1975.
(NCJ 50722)

The pros and cons of plea bargaining are reviewed, and a psychoanalytic theory to explain the evolution and probable retention of plea bargaining is developed. It is argued that the confession inherent in a plea bargain helps to relieve the guilt not only of the offender who enters into it and the public officials who help to negotiate and enforce it, but also of many members of the general public on whose behalf such pleas are made. Thus plea bargains would be products not only of so-called "objective" considerations, such as the need to avoid overtaxing an already hopelessly overburdened criminal justice system, but also of powerful unconscious motives to deal with the guilt associated with inner feelings and passions which fail to conform to society's norms. It is believed that the likelihood that plea bargains help to fulfill these significant unconscious needs may prove to be the basic reason why, despite the many objections raised, their use continues to proliferate.

62. THOMAS, P. A. Plea Bargaining in England. Journal of Criminal Law and Criminology, v. 69, n. 2:170-178. Summer 1978. (NCJ 54691)

The extent of plea bargaining in England's courts is explored, with consideration given to both express or overt plea bargaining and to implied or covert plea bargaining. Statistical information on magistrate courts, where 90 percent of all criminal trials are heard, indicates a high incidence of guilty pleas. In higher courts, however, there is insufficient evidence of frequency of plea bargaining. The issue is whether a procedural and professional framework exists that provides the opportunity for covert judicial plea bargaining. Expressed involvement of the judiciary in the plea bargaining process is prohibited, except that there are certain features of covert judicial plea bargaining which make the process plausible. Some of these are relationships between counsel and client, relationships between counsel and judge, and role of sentencing at the discretion of the judge. The administration of criminal justice in England and Wales is very complex and is under increasing pressure due to growing crime rates and inadequate budgetary resources for the police, the courts, social services, and prisons. Plea bargaining incorporates a visible judicial stance of nonintervention in a defendant's decision to plead, thereby responding to public expectations of the judicial role. Simultaneously, pressures within and imposed upon the courts can be alleviated by clandestine opportunities provided to the judiciary and counsel to speed trials to an early conclusion. Plea bargaining is a definitive aspect of English courts, as shown in superior court cases and relationships between professionals and clients. Case law is reviewed.

63. THOMSSEN, C. L. and P. J. FALKOWSKI. Plea Bargaining in Minnesota: Final Report of the Plea Negotiation Study. St. Paul, Minnesota, Crime Control Planning Board, 1979. 153 p. (NCJ 57404)

This final report of a Minnesota plea negotiation study is intended to provide descriptive information concerning plea bargaining in Minnesota's district courts. The data presented in this report were collected from county attorney and district court files and represent approximately 18 percent of the criminal dispositions filed in 1975. The sample consisted of 1,276 cases from 11 counties in Minnesota. Most criminal cases are settled by negotiations between the prosecution and defense counsel and culminate in a plea of guilty. Roughly 90 percent of all convictions are the result of a guilty plea, and of these approximately three-fourths are the result of a plea negotiation. In the 11 counties surveyed, plea bargaining rates range from a low of 46 percent to a high of 92 percent. This variation cannot be attributed to county population or criminal caseload nor to the type of attorney or type of plea agreement reached. The most common type of plea agreement involves prosecutorial recommendations concerning sentence with which the court frequently concurs. The most frequently occurring type of sentence agreement is when the prosecution recommends a sentence length which is less than the statutory maximum sentence. For male defendants, plea bargaining results in sentences which are more lenient than those of defendants convicted by other means. Different factors affect sentence severity for male and female defendants. For male defendants, type of conviction, type of crime, and the statutorily prescribed maximum sentence are significant in explaining variation in sentence severity. For female defendants, the number of counts in the case and the involvement in additional criminal cases are significant factors. For men and women, prior conviction record and use of a firearm play a significant role in sentencing. For males and females, race, type of defense attorney, number of counts and involvement in outside cases are insignificant factors in explaining variations in sentencing. The Sentencing Guidelines Commission is in the process of developing sentencing guidelines, and recommendations stemming from this report are directed toward the Commission. The text and the appendix include tabular data. A bibliography is provided.

64. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. Justice and Negotiation in the Criminal Courts. By P.J. Utz. Washington, 1977. 343 p. (NCJ 39455)

This paper studies the social organization of justice in the U.S. criminal court system and argues that in plea negotiations there are the roots of a new model of criminal justice geared to the values of substantive justice. The four-part study is the result of observations and interviews conducted in the courts of San Diego and Alameda counties from March 1974 through June 1975. Part one assesses the "administrative model" of plea bargaining, which argues that prosecutorial management concerns, judges and public defenders' bureaucratic needs, and pecuniary and professional interests of private attorneys make bargaining a necessity. A case study of the San Diego County court system is presented in the second part. Part three is the Alameda County courts' case study. Part four is a theoretical analysis of "substantive justice" bargaining and conditions that facilitate or hinder its growth, which holds that there is an inner dynamic to negotiation which propels each side to consider the claims of the other according to principles of rationality and fairness. The author concludes that the development of substantive justice negotiation may depend on judicial assumption of review and oversight duties. (Author abstract modified)

65. ________. Law Enforcement Assistance Administration. Plea Bargaining and the Criminal Justice Process: An Organizational Perspective. By W. F. McDonald. Washington, 1976. 24 p.
MICROFICHE (NCJ 57570)

The stated and unstated goals of the behavior of principal actors in the criminal justice process are examined and motivational theory developed, which is believed important for understanding plea bargaining. The paper was presented at the annual meeting of the American Political Science Association in Chicago in September 1976. Concepts developed from the application of organizational theory to the criminal justice process in general are discussed. The concepts developed are believed to be useful for understanding the place of plea bargaining in the criminal justice system. Organizational theory distinguishes between ultimate and operative goals. While ultimate goals define an organization's reason for existence, operative goals provide the specific content of ultimate goals and reflect choices between competing values for reaching ultimate goals. Also, two kinds of operative goals exist in organizations--those officially approved and unofficial goals usually tied to group interests. Unofficial goals do not necessarily have any connection with the ultimate goals of an organization, and, in fact, may subvert them. The pursuit of unofficial goals may eventually result in goal displacement, which involves a significant divergence of operational goals from ultimate official goals. In applying these general principles of organizational theory to the criminal justice process, the prosecutorial and dispositional segment of the process is given special attention. The ultimate goal of the criminal justice process is to administer justice. Less abstract subgoals are deterrence, rehabilitation, punishment, and incapacitation with reference to criminal behavior. While studies of operative goals in various agencies of the criminal justice system are connected to the ultimate goals of criminal justice, the substance of the operations performed, with special reference to the prosecutor's office and the courts, indicate the existence of unofficial goals. The principal unofficial goal is to act in such a way that decisions, actions, and overall performance of the principal actors are protected from criticism and marring the image of the actor, both with fellow professionals and the public. What happens to the offender is played out against the backdrop of this primary unofficial goal. How this perspective applies specifically to plea bargaining is briefly discussed. Reference notes are provided.

66. ________. Law Enforcement Assistance Administration. Plea Bargaining Who Gains? Who Loses? Final Draft. Washington, Institute for Law and Social Research, 1978. 172 p. (NCJ 49571)

Various aspects of plea bargaining are examined, with attention to equity, due process, and alternatives to plea bargaining. An introduction explaining the plea bargaining process is provided. Macro- and microperspectives on theoretical models of the criminal justice system are discussed, as are normative models. Empirical findings from other studies are noted, and a discussion of ethical issues is provided. The research methodology objectives and the issues to be examined are outlined along with the criteria for their selection. The analytical framework is noted. An overview of case processing is presented: the processing of criminal cases in the District of Columbia Superior Court is discussed, and a flow diagram detailing the aggregate number of cases is provided. Comparable case flows are also provided for the following individual offenses: Assault, robbery, larceny, and burglary. The question of who gains and who loses in the plea bargaining process is discussed with a focus on (1) sentencing in the criminal courts; (2) predicted sentences for defendants convicted by plea or dismissed; (3) the probability of conviction at trial; (5) explanations of plea and dismissal dispositions; and (6) the costs and benefits of plea dispositions in the District of Columbia courts. Relevant aspects of the theoretical models summarized in the first section are discussed to explain the guilty plea process. The following concerns are examined: the impact of resource constraints on case disposition; reducing uncertainty; mitigating circumstances; and individual proclivities of prosecutors, defense counsel, and judges. Finally, testable hypotheses relating to crime control and due process concerns are presented, with emphasis on factual guilt, legal innocence, policy implications for conflict resolution, and weighing crime control and due process considerations. Technical materials relating to sentencing, the probability of conviction, recidivism, workloads, case dispositions, and reasons underlying guilty pleas are appended. Graphic and tabular data are provided, and references are included.

67. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Impact on Plea Bargaining of Judicial Process Changes. By S. Nagel and M. Neef. Washington, 1976. 7 p. MICROFICHE (NCJ 36054)

Description of a model of the plea bargaining process which includes a means for determining in advance how changes in the judicial system may affect the likelihood or level of plea bargaining settlements. The model views the plea bargaining process as being analogous to a buying and selling transaction in a market that has no fixed prices with the defense counsel or defendant acting as buyer and prosecutor acting as seller. The bargaining process sets high and low limits according to buyer and seller perceptions of conviction probability and likely sentence. Relevant judicial system changes likely to effect a change on the bargaining process, such as increased free counsel or pretrial release and a lowering of litigation costs, are assessed. The implications for improving plea bargaining and the legal process through improved planning capabilities made possible by this predictive analysis are stressed.

68. UTZ, P. J. Settling the Facts: Discretion and Negotiation in Criminal Court. Lexington, Massachusetts, Heath Lexington Books, 1978. 207 p. (NCJ 45933)

Plea negotiations in the county courts of San Diego and Alameda counties, Calif., are discussed, and the institutional conditions affecting their character are explored. This study is based on 15 months of field work, from March 1974 to June 1975, in the counties of Alameda and San Diego. These two counties are quite similar with regard to population and size, but the types of crime are different. Alameda County, which includes the city of Oakland, has a more serious and violent type of crime, while San Diego County is just beginning to experience these crimes. The main focus is on plea negotiations in the two areas. The "Administrative Model" describes straining for cooperation between the prosecution and defense, but the actual patterns of bargaining do not reflect this cooperation: they are more indicative of the old adversary system. Plea bargaining is flawed with abuses, so an alternative diagnosis is suggested. In San Diego County, adversary bargaining is the norm. It does not reflect the inner dynamics of plea bargaining, but actually reflects the inhibiting conditions that constrain the practice. On the other hand, Alameda County has a full-fledged bargaining system. It is a form of evolved professionalism, based on rational and genuine cooperation between attorneys. Negotiation has brought a definite contribution to substantive justice, that of more principled negotiation. Notes are provided.

CHAPTER III — ELIMINATING PLEA NEGOTIATION

49. Utz, P. J. *Settling the Facts: Discretion and Negotiation in Criminal Court.* Lexington, Massachusetts: Lexington Books, 1978. [illegible]

[illegible]

69. **ANDERSON, D. C.** You Can't Cop a Plea in Alaska Anymore. Police Magazine, v. 2, n. 1:4-12. January 1979. (NCJ 53287)

The effects of Alaska's 1975 decision to ban most plea bargaining are discussed, along with police criticism of moves by prosecutors to try only those cases that allegedly guarantee conviction. In 1975, Alaska's attorney general decided to ban plea and charge negotiations and to prosecute suspects to the full extent of the law. However, since the ban went into effect, prosecutors have been using tougher standards to screen the cases they will accept for prosecution, and the police charge that this new attitude in district attorneys' offices is part of a calculated effort to make sure the ban on plea bargaining appears successful. The tighter screening, they argue, prevents a dangerously unmanageable increase in the number of cases going to trial, and it ensures that the state will win virtually all the cases it does decide to try in the process. However, the police contend that law enforcement suffers because, when prosecutors refuse to hear a questionable case, the suspect goes free although previously he would have been forced to plead guilty to a lesser charge. Research has shown that in the first year following the ban, the incidence of explicit sentence bargaining declined from more than 65 percent to between 4 and 12 percent of convictions. Although predictions that the courts would be swamped by a flood of new cases never came to pass, the number of cases going to trial increased significantly, but remained a small percentage of total cases. Lawyers and prosecutors claim that about the same number of defendants are choosing to plead guilty despite the fact that the state gives them nothing in return. To the extent that the police perceive the ban as a maneuver in a battle between police and prosecutors, they see the ban as a defeat. However, surprisingly, almost everyone agrees that, in one way or another, the ban has improved the quality of justice in Alaska.

70. **BAYLEY, C. T.** Plea Bargaining: An Offer a Prosecutor Can Refuse. Judicature, v. 60, n. 5:229-232. December 1976. (NCJ 38719)

The prosecutor's office of King County (Seattle), Washington, has stopped reducing charges and recommending reduced sentences for defendants charged with certain "high impact" crimes. Rape, robbery, and residential burglary were given highest priority, and case filing standards developed for these crimes: all provable multiple counts would be filed; any weapons allegations would be filed; and when applicable, habitual criminal status would be charged. In addition, a scale of standard sentence recommendations was developed which would vary only in accordance with specified aggravating or mitigating factors relating to the crime committed and the seriousness of the defendant's criminal record. The standard recommendations apply whether or not the defendant pleads guilty.

71. BERGER, M. Case Against Plea Bargaining. American Bar Association Journal, v. 62:621-624. May 1976. (NCJ 34692)

Arguments for and against plea bargaining are reviewed, and the results of a Maricopa County (Ariz.) ban on plea negotiations are outlined. Plea bargaining has long been considered a necessary part of the criminal justice system. Supporters of plea bargaining argue that such negotiations are necessary to avoid court congestion. The author refutes these arguments, contending that plea bargaining undermines justice, restricts judge sentencing discretion, causes a loss of public confidence, and promotes corruption in the prosecutor's office. The experience of Maricopa County is cited to demonstrate that plea bargaining is not an essential feature of criminal justice. In Maricopa County, plea bargaining was phased out for a wide range of felony crimes, including homicide, robbery, kidnaping, sale of narcotics, burglary, rape, and child molestation. It was found that the number of trials did not substantially increase, and that most defendants pleaded guilty to charges without plea negotiations.

72. CHURCH, T., JR. Plea Bargains, Concessions and the Courts--Analysis of a Quasi-Experiment. Law and Society Review, v. 10, n. 3:377-401. Spring 1976. (NCJ 45425)

This study assesses the impact of selective elimination of one form of plea bargaining on the court system of a large unidentified suburban county in the Midwest. A quasi-experimental research situation was unintentionally provided when, after an anti-drug election campaign, a newly elected county prosecuting attorney instituted a strict policy forbidding charge reduction plea bargaining in drug sale cases. Once a warrant for the felony of delivery of a controlled substance was issued, the assistant prosecutor in charge of the cases could under no circumstances lower the charge. The situation provided an opportunity to assess how a fundamental change in ground rules affected the interrelationships of the various court participants. Prior to the new policy, the majority of criminal cases were disposed of without trial after negotiation between assistant prosecutor and defense attorney. Judges were seldom involved in the process except to ratify the final agreement. Dispositional information was obtained on drug cases for 1972, the last year plea bargaining was allowed, and 1973, the first year of the prohibition. By the end of 1973, reduced-charge guilty pleas--the predominant mode of disposition in 1972--were almost totally eliminated. The trial rate increased greatly, and the total proportion of cases decided through pleas of guilty fell considerably. Bargain justice continued, however. The emphasis shifted from reduction in charge, which the prosecutor could effect, to reduction in sentence for a guilty plea, which only the judge could decide. Other tools for the prosecutor in inducing pleas did remain. The prosecutor could decide whether to charge a repeater under the habitual offenders statute, to drop other charges pending against the defendant, or to recommend a harsh sentence to the probation department for inclusion in their presentence report. Defense attorneys criticized the policy because it caused them difficulties in dealing with their clients; in return for their fee they had been expected to negotiate with the prosecutor for reduced sentences. It was found that plea bargaining is difficult to eliminate because it reduces the uncertainties and risks inherent in a trial for all court participants, including the defendant. Alleviation of this uncertainty is important for all concerned.

73. DAVIS, W. J. No Place for the Judge. Trial, v. 9, n. 3:22, 43. May/June 1973.
(NCJ 10621)

The United States District Court judge for the District of Massachusetts argues against the use of plea bargaining and judicial participation in the process. The main objection to plea bargaining for this author is that it enhances the possibility that an innocent person might plead guilty to avoid the death penalty, or to avoid lengthy incarceration. Opposition to judicial participation in the plea bargaining system is based on a belief that sentencing is within the judge's discretion and should not be subject to outside controls. This judge argues that a defendant is not entitled to know what sentence he will receive before pleading to a charge.

74. HAAS, H. H. High Impact Project Underway in Oregon: "No Plea Bargaining Robbery and Burglary." Prosecutor, v. 10, n. 2:127-128. 1974.
(NCJ 14676)

Special prosecution unit will assume case preparation and trial responsibilities for target crimes, home burglaries and theft offenses, and armed robberies. Three broad goals of the project are to improve the quality of cases coming to trial by providing legal advice and casework assistance to police investigators, to provide swift and appropriate prosecution of target crimes, and to reduce negotiated pleas. The planners hope to determine whether or not plea bargaining is an institutionalized myth or a positive factor in efficient and just prosecution.

75. KROLL, R. K. Plea Circus. Student Lawyer, v. 3, n. 5:9-11. January 1975.
(NCJ 56642)

The effects of plea bargaining in undermining the constitutional rights of defendants are discussed. Marshall Hartman, National Director of Defender Services for the National Legal Aid and Defenders Association, proposes that the system of plea bargaining be abolished because it uneconomically deals with the mounting demands on the criminal justice system and it degrades the lawyers, judges, prosecutors, and defendants who use it. In this article, Hartman was interviewed in an effort to elicit his views on plea bargaining. Hartman was alarmed because the entire system of personnel case assignments and court case flow management is based upon an affirmation of plea bargaining and its value for the criminal justice system. Hartman considers the basic format of plea bargaining, which promises a defendant a lighter sentence for pleading guilty, as compared to a sentence derived from guilt proven in a court trial, to be basically unconstitutional. Arguing from Duncan v. Louisiana, 1968, which held that the right to jury trial is a guaranteed right under the sixth amendment, Hartman maintains that a person cannot be penalized for exercising a constitutionally guaranteed right. A person is given a heavier sentence for having his or her guilt established through a court trial rather than determining guilt through the plea bargaining process. Therefore, due to the enticing leniency of plea bargaining, many defendants who are in fact innocent plead guilty in order to avoid the risk of conviction under a more punitive sentence in a trial. Eliminating plea bargaining may result in greater financial costs to the taxpayer (due to increased court time and hiring more court personnel), but preserving and fostering the court trial as the means for establishing the guilt or innocence of accused persons is vital to the American justice system.

76. MARTIN, M. P. System Dynamics Evaluation of Alternate Crime Control Policies--An Alaskan Viewpoint. Justice System Journal, v. 3, n. 3:281-287. Spring 1978. (NCJ 48282)

Predictions derived from a mathematical system dynamics model are compared with the actual effects of a statewide prohibition of plea negotiations in Alaska. The model used was developed on the basis of simulation research on the criminal justice system in Washington, D.C. According to the model, the elimination of plea bargaining would result in an increase in pretrial dismissal rates, a decrease in conviction rates, and an increase in cases awaiting trial. To mitigate some of the differences in size, racial composition, and other variables which distinguish the Washington situation from that in Alaska, only data from felony and misdemeanor cases in Anchorage were analyzed. Predictions were compared with the relevant court data for the pre-elimination period of 1974 and 1975 and the impact period of 1976 and 1977. Contrary to model prediction, dismissal rates for felonies followed the pattern of pre-elimination years and decreased. While dismissal rates increased for misdemeanors, this is also in keeping with the pre-elimination trend. Again, contrary to prediction, both felony and misdemeanor convictions increased during the impact period. While the period is too short to adequately test the impact of plea bargaining elimination on crime rates, there has been a decrease in felony filings during the impact period. As predicted, trial throughout rates did increase, but there was a doubling rather than a tripling of the rates. While there was a decrease in average days to disposition for felonies following elimination of plea bargaining, the average time for disposition of misdemeanor cases increased by 246 percent between 1974-1977. A factor not included in the model, but of great impact, has been a dramatic increase in appeals since the elimination of plea bargaining. In addition, calendering procedures have been changed or tightened and stricter continuance policies have been instituted. Possible factors affecting the differences between model predictions and the actual Alaskan experience are discussed, and the utility of the model is briefly examined. Reference notes are included.

77. McGUIRE, C. R. Bargained Plea: Justice Compromised and Justice Denied. Illinois Bar Journal, v. 65, n. 9:576-579. May 1977. (NCJ 55862)

The sole justification of plea bargaining is to overcome court backlogs. If this problem can be solved, public confidence and potential abuses demand that the practice be reduced or abolished. Plea bargaining simultaneously victimizes the public by excessive leniency for hardcore criminal repeaters and deprives the innocent defendant of the forum where the state's attorney must prove his case. Experiences in the few jurisdictions that have reduced or eliminated plea bargaining (Phoenix, Ariz., and Washington, D.C.) show a substantial increase in guilty pleas, and although some increase in contested trials probably occurs, this should never reach the flood proportions predicted by defenders of plea bargaining if the prosecutor's office is administered properly. Plea bargaining encourages the prosecutor to proceed with cases that should be dropped because of lack of evidence, and it encourages the practices of "over charging" and "loading charges," whereby either the type of charge is too severe or the number of charges is unwarranted in the hope of negotiating a plea. Corruption is also much more likely in an office that bargains than in one that does not. The public through its legislatures has prescribed certain punishments for certain crimes, and to bargain away these sentences is to defeat the intent of the public. Experienced states' attorneys are necessary to eliminate plea bargaining; they must know which cases to try and provide moral and legal leadership to the staff. With the elimination of plea bargaining, sentences should become more rational, since they will no longer be based on what is agreeable to the defendant. Plea bargaining, however, may be justified in a few cases involving informants, and enough flexibility should be retained to employ it in these few situations. The elimination of plea bargaining will increase fairness and rationality in our criminal justice system.

78. PARNAS, R. L. and R. J. ATKINS. Abolishing Plea Bargaining: A Proposal. Criminal Law Bulletin, v. 14, n. 2:101-122. March/April 1978.
(NCJ 45587)

Forces behind the movement to abolish plea bargaining are examined, attempts to restrict plea bargaining in four jurisdictions are reviewed, and a plan to replace plea bargaining with charge-setting hearings is proposed. Serious constitutional questions surround the practice of plea bargaining. The crucial question is this: How can a democratic system of government condone a process whereby people who choose to exercise their constitutional right remain charged with criminal conduct bearing greater potential punishment than the lesser charges they would be offered were they to forego the exercise of their constitutional rights? Major impetus for the abolition of plea bargaining came from the National Advisory Commission on Criminal Justice Standards and Goals, which called for an end to the practice by 1978. A review of steps taken to restrict plea bargaining in the U.S. Attorney's office for the Southern District of California, the State of Alaska, Multnomah County, Ore., and Maricopa County, Ariz., offers evidence against claims that, without plea bargaining, the criminal justice system will topple under its own weight. Ideally, the appropriate charge in each case must be sought as early as possible. Once the appropriate charge is determined, the prosecutor should not seek to reduce it solely to obtain a plea of guilty. If the appropriateness of the charge is the key to a system free of plea and sentence bargaining, there must be a control on that key beyond the prosecutor's good faith and adherence to established criteria. That key could be provided in a charge-setting hearing, in which the court, having considered all information presented to it by court personnel, the defense, and the prosecution, selects the appropriate charge.

79. PUTNAM, J. T. Muncipal Plea Bargaining: Right or Wrong. Criminal Justice Quarterly, v. 4, n. 2:74-82. Spring-Summer 1976.
MICROFICHE (NCJ 37645)

This article examines the effect of a policy change passed by the New Jersey Supreme Court which prohibited plea bargaining in the municipal courts for all nonindictable offenses, after one year in operation. The background which led to the decision to eliminate plea negotiations in municipal courts is explained. A critique of the rationale used by the State Supreme Court and the administrative office of the courts to justify the change in prosecutorial policy is presented. It is concluded that, if the practice of plea bargaining is to be prohibited in the municipal courts, then an injection of heavy state financial assistance must be provided to offset the inevitable increase in court costs.

80. NATIONAL CENTER FOR STATE COURTS, PUBLICATIONS DEPARTMENT. Study of Plea Bargaining in Municipal Courts of the State of New Jersey. Williamsburg, Virginia, 1974. 106 p. MICROFICHE (NCJ 19955)

Results of a study undertaken to determine whether the March 27, 1974, New Jersey prohibition of plea bargaining in the municipal courts should continue or whether some form of plea bargaining should be allowed. In order to study thoroughly the implications of plea bargaining and the prohibition, the National Center for State Courts conducted an in-depth examination of a specific category of case for several years, both before and during the time the prohibition was imposed. The offenses of driving while intoxicated and driving while impaired were examined for the month of May for 1972, 1973, and 1974. The study consisted of legal research, field interviews, questionnaire survey research, and an analysis of relevant statistical data. The results of the field interviews of judges and an analysis of the driving while intoxicated or impaired offenses are included in this report. It was noted that of the 38 municipal judges interviewed, 12 favored a continuation of the prohibition while 26 favored removal of the prohibition. This report recommends that the present prohibition against plea bargaining in the Municipal Court be continued for the following reasons: municipal court judgeships, as presently structured, do not sufficiently insulate judges from the pressures of local political life and of time demands for private activities; local prosecutorial services, as presently structured, are also too closely tied to the municipalities, are often unavailable to the municipal courts, and are unable to screen complaints for drunk driving cases; and the administrative structure of the municipal courts, individually and as a group, is seriously defective. (Author abstract modified)

81. RUBINSTEIN, M. L. and T. J. WHITE. Plea Bargaining: Can Alaska Live Without It? Judicature, v. 62, n. 6:266-279. December/January 1979. (NCJ 53265)

To gauge the impact of the Alaskan ban on plea bargaining and actual adherence to the rule, interviews were held with 400 judges and lawyers, and information from 3,586 case files was examined. The 3,586 case files involved about 2,300 defendants processed through the criminal justice system during the year before the policy banning plea bargaining went into effect (Year I) and the year following the adoption of the policy (Year II). The cases were traced through the court system. Variables on the cases--offender's age, sex, race, income, offense, and type of defense attorney--were collected, and six classes of statutory offenses were described. Statistical evidence shows that plea bargaining occurred in only 4 to 12 percent of conviction cases in Year II, a drastic reduction from Year I. Interview responses indicate that plea bargaining has almost disappeared and charge bargaining has declined. Private lawyers complained that they are required to do more motion practice and trial preparation since plea bargaining has been banned. Prosecutors agreed that the ban has made their jobs more difficult but report they are happy to be relieved of sentencing responsibilities. From Year I to Year II, the average processing time for a felony case was reduced from 192.1 days to 89.5 days, trials increased by 97 percent in Anchorage and 57 percent in Fairbanks, and trial convictions were up 11.3 percent. Sentences were more severe in Year II. The number of defendants receiving prison sentences longer than 30 days for violent crimes increased by 6 percent, defendants indicted on property crimes received sentences that were 53 percent longer, and persons convicted of fraud and forgery and for drug crimes obtained sentences that were 117 percent and 233 percent more severe, respectively. Issues in plea bargaining use are reviewed and tabular data are provided.

82. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. Alaska Judicial Council: Interim Report on the Elimination of Plea Bargaining. M.L. Rubinstein, Proj. Dir., Anchorage, Alaska. Alaska Judicial Council, 1977. 233 p. (NCJ 46876)

A preliminary evaluation is made of a new statewide policy which prohibits district attorneys and their assistants from engaging in plea negotiations. The new policy took effect in Alaska in August 1975. This evaluation compares the year immediately preceding the plea negotiations prohibition with the year immediately following to determine: (1) whether plea bargaining as defined by the State Attorney General has been eliminated and (2) what the effect of the new policy has been on the criminal justice system. Mail surveys; personal interviews with 174 attorneys, judges, and law enforcement officers; and a statistical analysis of 23,000 misdemeanor cases were used for the evaluation. A significant number of respondents agreed that sentence bargaining had been virtually eliminated. The remainder felt that it had been substantially reduced. It was hypothesized that with no plea bargaining there would be fewer incentives for a defendant to change his plea from not guilty to guilty, and thus the system would slow down. The case analysis showed that the number of trials in district courts increased by an average of 72.4 percent. However, court disposition times declined significantly, up to 32.4 percent in Anchorage. Attorneys did not like the new policy because every case had to be treated as if it were going to trial. This need of diligent preparation increased the cost of representation for middle-class persons. Many judges and district attorneys were also critical of the policy for misdemeanors. They said that it was impossible for the state to properly litigate all charges filed, and thus more cases would be dismissed. This increase in dismissals was confirmed by the case study. The new policy also virtually eliminated judicial participation in preplea sentencing discussions. Another association has been the fact that the average jail sentence increased in severity and the average net fine increased by 13.6 percent after the new policy was instituted. However, this increase might be the result of newspaper pressure and the fact that 1976 was an election year. Few persons interviewed felt that this effect could be directly attributed to the new plea bargaining policy.

83. ________. Law Enforcement Assistance Administration. Limiting the Plea Bargain in Multnomah County (Ore.). Portland, Oregon, Multnomah County District Attorney's Office, 1977. MICROFICHE (NCJ 46993)

Limiting plea bargaining for serious crime was tried in Multnomah County (Portland, Ore.) in a unique LEAA-funded program; operation and evaluations of the program are reported. This 2-year prosecution project, known as the No Plea-Bargain Project ("Impact Unit"), devoted 100 percent of its energy to prosecuting home burglars, armed robbers, and major "fences" by refusing to reduce the top felony charge. Unlike the horizontal movement of a case through most urban prosecutors's offices, the impact unit assigns the case to a single deputy district attorney from the time it enters the system until its resolution at trial. Contrary to original expectations, arrest-to-trial time has not lengthened the time for case disposition, nor has refusal to plea bargain led to clogged trial dockets and inefficiency. Two major evaluations of the program have now been carried out. The Oregon Law Enforcement Council, using data from 1972-1973, found that there were dramatic increases in the numbers of defendants who pled to the original charge and concomitant reduction in the numbers of charges dismissed or reduced, while at the same time 59 percent more burglary, robbery, and theft cases were prosecuted. The Rand Corporation conducted a random survey of 100 burglary and robbery cases in 1973-1974 and found that (1) "original charge" conviction rates for robbery by trial or guilty plea rose from 23 percent in 1973 to 71 percent in 1974; (2) pretrial dismissal rates fell from 44 percent to 12 percent, and there was a rise in gross plea rates (41 to 61 percent) and overall conviction rates (47 to 77 percent); (3) charge bargaining on robbery guilty pleas decreased drastically from 59 percent in 1973 to 6 percent in 1974; (4) a higher proportion of impact offenders was incarcerated (67 to 87 percent); and (5) impact offenses were moved more expeditiously. Because of the success of impact, the Multnomah County's district attorney's office has restricted its plea bargaining policy to include other criminal charges and all cases involving career criminals. Tabular material is included.

84. ________. Law Enforcement Assistance Administration. Multnomah County (Ore.) District Attorney's High Impact Project. H. Haas, Proj. Dir. Portland, Oregon, Multnomah County District Attorney's Office, 1976. 16 p. MICROFICHE (NCJ 31734)

Final report on a project to implement a no-plea-bargaining policy in the Multnomah County (Ore.) district attorney's office for a 2-year period ending September 30, 1975. The project was undertaken in response to the many perceived abuses of the plea-bargaining process and to the poor quality of case preparation as evidenced by the low number of original charge convictions. The project set out to achieve its goals through the provision of legal advice and case assistance to police investigators and through the establishment of a felony review panel composed of police and prosecutors. The panel reviews all felony cases prior to making the charging decision. The self-evaluation methodology involved the comparison of statistics taken before and during the project on conviction rates, original charge convictions, case dispositions, etc. Results indicate that the project successfully raised original charge conviction rates and reduced acquittals and instances of plea bargaining.

85. ________. Law Enforcement Assistance Administration. Plea Bargaining in Some of the Largest Cities in the United States. By R.H. Williams. Washington, 1975. 40 p. (NCJ 41593)

This paper makes the case for abolishing the practice of plea bargaining. The author believes that plea bargaining obliterates the need for the criminal justice system to treat individuals fairly and according to their own needs. The paper, to illustrate this point, quotes one high court official as saying that the court is like a machine grinding out products. According to one survey the author uses, 73 percent of respondents favor the convening of a national conference to discuss and solve the problem of plea bargaining. The author believes that such a conference should initiate strategies aimed at abolishing plea bargaining.

86. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Multnomah County (Ore.) No-Plea Bargaining Unit: Exemplary Project Validation Report. Cambridge, Massachusetts. Abt Associates, 1976. 223 p. MICROFICHE (NCJ 36581)

Exemplary project validation report of an impact cities project of the Multnomah County district attorney's office to deter impact crimes by obtaining high conviction and incarceration rates for them. The project consisted of a unit of five deputy district attorneys established to prosecute the impact crimes of armed robbery, burglary in a dwelling, and receiving stolen property. To accomplish this, the unit sought to assign each case to one district attorney from screening to disposition; provide swift and complete prosecution in a maximum of 60 days from arrest to trial; and reduce the incidence of plea bargaining. This validation report incorporates information from the No-Plea Bargaining Unit Exemplary Project Application; a preliminary evaluation by the Oregon Law Enforcement Committee; an evaluation by the Rand Corporation; and statistics from the 1974 annual report of the Multnomah County district attorney's office. The project's success, adaptability, and strengths and weaknesses are assessed.

87. UNIVERSITY OF IOWA. Elimination of Plea Bargaining in Black Hawk County: A Case Study. Iowa Law Review, v. 60:1053-1071. 1975. (NCJ 31912)

Value of plea bargaining as a criminal justice institution was examined using data from the county court in Black Hawk County, Iowa. This examination involves three steps of analysis. First, a brief judicial history of plea bargaining is presented. Then the social costs and benefits of plea bargaining are explored to assess its value as an established institution in our criminal justice system. Finally, this cost/benefit analysis is tested by statistical data obtained from the criminal dockets of Black Hawk County, Iowa. It is seen that some of the traditional notions which surround the institution of plea bargaining are not supported by objective data. This study reveals a more efficient criminal justice system with Black Hawk County after plea bargaining was eliminated and the system was given the benefit of certain key supporting structures. This increased efficiency was evidenced in three major areas: first, the county attorney's office was able to obtain the same number of felony convictions while the number of cases filed during the comparison period decreased 23 percent; second, there was a 500 percent decrease in the number of dismissals occurring from 1973 to 1974; third, while 50 percent of the trials during the 1973 quarter resulted in guilty verdicts, 75 percent of the trials resulted in guilty verdicts during the corresponding quarter in 1974. (Author abstract)

CHAPTER IV—RESTRUCTURING PLEA NEGOTIATION

88. ALSCHULER, A. W. Trial Judge's Role in Plea Bargaining, Part I. Columbia Law Review, v. 76, n. 7:1059-1154. November 1976. (NCJ 39772)

An analytic discussion of the types of plea bargaining, arguments for and against judicial participation, and rationales for bargaining. Author's commentaries on judicial participation in plea bargaining cover systems in which prosecutors completely dominate plea bargaining and judges do not participate; systems in which there is no explicit bargaining but to those defendants who do not take their cases to trial; systems in which judges participate but avoid specific promises. Arguments that judges would have difficulty being impartial in cases where they have participated in the bargaining are analyzed. Suggested reforms for the improvement of the entire plea bargaining system include more judicial control of sentencing promises, negotiation in the defendant's presence, and negotiation based on the sentence to be imposed rather than on the number and level of charges.

89. BORREGO, T. R. Criminal Law: Plea Negotiations--Legitimizing the Agreement Process. Oklahoma Law Review, v. 27, n. 3:487-499. Summer 1974. (NCJ 25327)

Recommendation to formalize the plea bargaining process with a written agreement that would be filed in the case. The major benefit derived from a formal plea bargaining session would be to alleviate or eliminate the mistakes and misconceptions which, at present, commonly occur between prosecutor and defendant.

90. GALLAGHER, K. Judicial Participation in Plea Bargaining: A Search for New Standards. Harvard Civil Rights-Civil Liberties Law Review, v. 9, n. 1:29-51. January 1974. (NCJ 30296)

This article suggests standards to maximize the benefits and fairness of conviction without trial through exclusion of the judge in the plea negotiations and an open and contractual approach to such negotiations. It is generally recognized that judicial participation in the plea negotiation process creates due process problems. Two opposing solutions have generally been suggested. Some commentators argue that the trial judge should be moved from his present informal, loosely defined role to the center of the plea bargaining system. This article generally supports the opposite solution: the trial judge should be totally excluded from preplea negotiations. These alternatives are analyzed from two different perspectives. First, the constitutional questions are explored. Then a brief consideration of the validity and application of recent contractual approaches to plea bargaining is undertaken. The author argues that a preplea conference before an impartial hearing examiner could be used to set forth conditions of the plea negotiation, thereby ending the defendants' danger of "pleading in the dark," and reducing the coercive power of the prosecutor and judge. She further states that removal of the trial judge from preplea negotiations is a vital step towards ensuring that the guilty plea meets both constitutional and contractual requirements. (Author abstract modified)

91. ______. Voluntary Trap. Trial, v. 9, n. 3:23-26. May/June 1973. (NCJ 10620)

Problems resulting from sentencing promises by trial judges during plea negotiations are analyzed, and several remedies are suggested to protect the defendant's rights. The Supreme Court has mandated that, to preserve the defendant's due process rights, trial records must show that guilty pleas were entered voluntarily, intelligently, and understandingly. Difficulties in meeting the voluntariness standard are encountered when judges tender sentencing promises during plea bargaining. The coerciveness inherent in such situations has led to two lines of appellate decisions limiting trial judge discretion in this area, those which bar judicial participation in plea negotiations completely, and those which hold judicial promises to be only one factor in determining the voluntariness of a plea. It is suggested that the best solution to this problem is to bar the trial judge from plea negotiations and to bind him to impose a sentence no greater than that recommended by the prosecutor. If the prosecution recommendation is denied, the defendant should be given the opportunity to withdraw his plea.

92. GEORGE, B. J. JR. and H. S. MILLER. Criminal Justice Issues: Plea Negotiations. Detroit, Citizens Research Council of Michigan, 1977. 24 p. (NCJ 45009)

Major issues in the controversy regarding plea negotiations are explored in two papers. A background paper reviews the constitutional status of plea negotiation and acceptance of guilty pleas, guilty plea practices in Michigan, and arguments cited by proponents and opponents of traditional plea negotiation. Recommendations by two Michigan Advisory Commissions on Criminal Justice with regard to changing plea negotiation practices are noted. The second paper opens with an overview of plea negotiation in the United States, including a review of the findings and recommendations of various national commissions and standards-setting bodies. Issues in the debate over plea negotiation practices are discussed, including the question of whether innocent persons may be coerced into pleading guilty, the matter of judicial participation in plea discussions, and questions regarding the adequacy of information available to the prosecutor and the defense attorney during the plea negotiation process. Other issues concern the exercise of unregulated discretion by prosecutors and the secrecy of the plea negotiation process. It is pointed out that it may be extremely difficult to abolish all forms of plea bargaining, given evidence that people in institutional settings naturally seek ways of accommodating and working out arrangements. It is suggested that, before attempting to abolish all plea bargaining, consideration be given to bringing the process out into the open, making participants accountable for the decisions they make, and providing all participants with adequate resources. Such measures as sunshine laws, accountability requirements, full information assurances, and judicial in-court inquiries into the facts could reduce abuses in the plea bargaining process.

93. HARVARD LAW REVIEW ASSOCIATION. Plea Bargaining and the Transformation of the Criminal Process. Harvard Law Review, v. 90, n. 3:564-595. January 1977. (NCJ 39221)

Deals with the structural reforms of plea bargaining and discusses its theoretical advantages over the traditional model of criminal process. The article begins with an examination of those elements of the traditional model which led to its breakdown and to the development of plea bargaining. Also discussed are the problems inherent in plea bargaining. The second part of the document analyzes two prior proposals for reforming the current plea bargaining process. Finally, the last part presents a magisterial/participation model of plea bargaining as a subsystem of the traditional model. By requiring a plea screening hearing before an investigative magistrate prior to plea bargaining and by insisting on the defendant's participation in the plea negotiations, this model would realize the potential advantages of a bargaining system and ameliorate the defects of the current practice. (Author abstract)

94. HOFFMAN, W. E. Pleas of Guilty in the Federal Courts. Practical Lawyer, v. 22, n. 6:11-24. September 1976. (NCJ 55207)

The pleas of guilty and nolo contendere in the Federal courts are discussed, and various sentencing alternatives are detailed. The majority of defendants in Federal courts plead guilty or nolo contendere. Nolo contendere is typically treated by the courts as a guilty plea, the difference being that nolo contendere may not be introduced as an admission of guilt in a subsequent civil suit. Under amended rules, Federal courts are required to ensure that the defendants fully understand the potential consequences of a guilty or a nolo contendere plea. The required judicial advice to defendants is listed in the appendix. Nolo contendere does not have to be accepted by the court and is occasionally rejected. It is estimated that approximately 65 percent of all cases reaching Federal courts involve plea bargaining. In the past, plea bargaining was done behind closed doors with the understanding that judges would refrain from participating. Under the new rules, it now appears that judges may participate in whatever discussions occur after the plea agreement is disclosed. Under the amended rules all plea bargaining agreements must be placed on the official court record. However, courts are not bound by agreements between prosecuting and defense attorneys. In cases of multidistrict litigation, plea agreements approved in one district must be upheld in another. If the court decides to reject a plea agreement, it must take the following steps: (1) inform the parties, (2) advise the defendant in open court or otherwise that the court is not bound by the plea agreement, (3) afford the defendant an opportunity to withdraw the original plea, and (4) advise the defendant that if he or she persists in his plea of guilty or nolo contendere, the disposition of the case may be less favorable than that contemplated in the plea agreement. No references are provided.

95. MORRIS, N. Pretrial Arbitration: Proposal for a New Model. Santa Barbara, California, Center for the Study of Democratic Institutions, 1973. (NCJ 31872)

A proposal is made for a "more principled" kind of pretrial procedure than plea bargaining in which only the prosecutor and defense counsel negotiate on a matter of great concern to both defendants and plaintiffs. The dean of the University of Chicago Law School suggests that all the parties in a case (including the judge, victim, accused offender, as well as the prosecutor and defense counsel) should take part in the negotiations. This tape, part of a series of eight tapes (NCJ 31870 through 31877) on the posture of the criminal justice system in the year 2000, sells for $59.40. The tapes were edited from the proceedings of a conference on "The Politics of Change in the Criminal Justice System."

96. MULKEY, M. A. Adjudication as the Administrative Procedures of Charging and Plea Bargaining: The Roles of Prosecution and Defense. In J. A. Gardiner and M. A. Mulkey, Crime and Criminal Justice. Lexington, Massachusetts, 1975. 10 p. (NCJ 37757)

After examining the factors which influence the prosecutor's decision to bring charges and to negotiate a plea, this article reviews criticisms of plea bargaining and discusses policy issues relating to plea negotiation. The decision to charge may be affected by such variables as the strength of the state's case, the propensity of the judge to dismiss or acquit certain types of defendants, the possible defenses of the defendant, the criminal history of the defendant, the seriousness of the crime, and the resources available to the prosecutor. Similar factors are found to influence the decision to plea bargain. Among the criticisms of the plea bargaining process noted by the author are that plea bargaining may encourage unnecessary guilty pleas; that such negotiations may lead to incomplete development of the facts of the case; that plea negotiations may ignore the individual rehabilitative needs of the defendant; and that plea bargaining may lead to irrational sentence disparity and allows illegitimate considerations such as the strength of the state's case and the concern for court case flow to enter into the determination of sentences. Finally, the author discusses two important issues which have received considerable attention in terms of proposals for reform: the low visibility of the plea negotiation practice and the widespread lack of explicit policy concerning its procedures and standards. (Author abstract modified)

97. NIMMER, R. T. and P. A. KRAUTHAUS. Plea Bargaining: Reform in Two Cities. Justice System Journal, v. 3, n. 1:6-21. Fall 1977. (NCJ 43769)

The impact of plea-bargaining reforms implemented in Detroit, Mich., and Denver, Col., is assessed. Plea bargaining involves a system and members of the judiciary: this system directly accounts for the disposition of the majority of all criminal cases. Plea-bargaining reforms in Detroit and Denver were implemented by prosecutor policy decisions, not by judicial rulings or legislation. In both cities, plea conferences were created by the adoption of policies requiring that all negotiations take place in semiformal conferences involving all relevant parties, and that failure to reach agreement during the conference terminate further negotiation. A staff of assistant prosecutors was assigned responsibility for conducting all negotiations. Policy statements defining concessions to be made in various types of cases were published, and prosecutors explicitly adopted the practice of disclosing information to the defense. The reforms were successful in Detroit, but not in Denver. In Detroit, substantial efforts were made to accommodate the interest of the local bar and judiciary in the reform. In Denver, no such efforts were made. The Detroit reforms represented only a small change, whereas in Denver the reforms marked a radical departure from prior practices. The significance of these differences in accounting for the differential impact of the reforms is discussed.

98. SCHEPPS, D. D. Trial Judge's Dilemma: The Taking of Guilty Pleas. Court Review, v. 16, n. 3:4-7. January/February 1978. (NCJ 51822)

A precise procedure for hearing guilty pleas is suggested for the court in order to reduce the grounds for appeals when the plea is denied. It is reported that 50 to 60 percent of the post-conviction proceedings heard in the Federal and State courts come from defendants who have entered guilty pleas. The making and preserving of a record, preferably verbatim, of all court proceedings surrounding the hearing of a negotiated guilty plea is recommended. It is advised that the record should contain a complete statement of the terms of the agreement and the judge's reasons for accepting or denying the plea. This formal procedure is believed necessary because the plea discussions themselves are usually informal and practically unreviewable. While it is maintained the court should not participate in plea negotiations, the court should inquire as to the existence of a negotiated agreement whenever a guilty plea is entered, with a view toward carefully scrutinizing the substance of the agreement. It is further suggested that the court, before accepting a guilty plea, should require the defendant to make a detailed statement regarding the offense to which he is pleading guilty. Such a statement would also stipulate other offenses of which the defendant had been earlier convicted. Should the trial judge not accept the guilty plea, this statement and any evidence obtained through it would be inadmissible against the defendant in any subsequent prosecution. A list of reasons for the court not to accept a guilty plea is presented. Some judicial decisions bearing on plea negotiations are briefly discussed, and improper inducements communicated to the defendant for the purpose of securing a guilty plea are identified.

99. SMITH, J. M. and W. P. DALE. Legitimation of Plea Bargaining: Remedies for Broken Promises. American Criminal Law Review, v. 11, n. 3:771-799. Spring 1973. (NCJ 10999)

Problems and injustices of current plea bargaining procedures, and discussion of possible solutions. The problems of unkept bargains, misunderstandings, and misrepresentations are rooted in the secretive approach which courts and participants have historically taken to plea negotiations. Its prevalence and importance require greater attention to the realities of plea bargaining. The authors recommend adoption of preventive measures to eliminate many of the uncertainties and exigencies of the negotiated plea. One of these measures would be to set down the plea negotiations in writing, divulge the results to the court, and incorporate the written agreement into the official court record. Other areas discussed are theories of relief based on standards of voluntariness and procedural fair play, and judicial participation in plea negotiations. (Author abstract modified)

100. U.S. DEPARTMENT OF JUSTICE. Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Pretrial Settlement Conference: An Evaluation Report--Draft. W.A. Kerstetter, Proj. Dir. Chicago, University of Chicago Center for Studies in Criminal Justice, 1979. 184 p. (NCJ 56875)

Directed at both criminal justice practitioners and researchers, this study outlines a Dade County, Fla., proposal to voluntarily involve victims, defendants, and police in judicial plea negotiation conferences. Supported by LEAA, the study had several objectives: (1) to determine whether pretrial settlement conferences were a feasible case disposition procedure in a major urban area felony court; (2) to make a preliminary determination of the procedure's impact on case processing and disposition; and (3) to assess the impact of the conference on the judges, attorneys, victims, defendants, and police involved. The field experiment in Dade County proposed that all plea negotiations take place in front of a judge and that the victim, defendant, and police officer be invited. The conferences were brief, but generally reached at least an outline of a settlement. They usually included at least one lay party, although the attendance rates for the victim and police officer were low. The change in the structure of the plea process reduced the time involved in clearing cases by lowering the information and decisionmaking costs to the judges and attorneys. No significant changes in the settlement rate or in the imposition of criminal sanctions were noted. There was some evidence that the police and, to some extent, the victims who attended the sessions obtained more information and had more positive attitudes about the way the cases were handled. A brief background discussion and literature are provided, along with a description of the full pretrial settlement conference proposal and its rationale. The issues addressed in implementing the proposal are discussed, as are the research methodology, findings, and implications. Tabular and graphic data are provided. The sample procedure and instruments are appended.

101. YALE UNIVERSITY LAW SCHOOL. Restructuring the Plea Bargain. Yale Law Journal, v. 82, n. 2:286-312. December 1972. (NCJ 08272)

Critique of the present system and suggestions that, since the plea bargain is in reality a sentence determination, a formal judge-supervised hearing be held. The author outlines the content of his preplea hearing, discusses the benefits which would result, and responds to possible criticisms of the hearing.

102. ALSCHULER, A. W. Supreme Court, the Defense Attorney, and the Guilty Plea. University of Colorado Law Review, v. 47, n. 1:1-71. Fall 1975. (NCJ 31181)

In analyzing significantly relevant Supreme Court decisions, this article argues that the court has abandoned desirable concepts of waiver in guilty plea cases and given unjustified weight to counsel presence. The article analyzes the Supreme Court's guilty-plea trilogy (Brady v. United States, McMann v. Richardson, and Parker v. North Carolina) as well as a number of subsequent Supreme Court decisions (including Tollett v. Henderson, Robinson v. Neil, Blackledge v. Perry, Ellis v. Dyson, and Lefkowitz v. Newsome). A section on "the merits and demerits of the knowing waiver concept" explores problems of finality and habeas corpus jurisdiction. In considering whether a guilty plea should be held involuntary only when induced by a threat of unlawful action, the article examines the history of the doctrines of unconstitutional conditions, the doctrine of duress in private contract cases, the law of voluntariness applicable to out-of-court confessions, and the Supreme Court's treatment of non-guilty-plea waivers of constitutional rights. Among the other topics considered are retroactivity in constitutional adjudication and the requirement of the effective assistance of counsel. (Author abstract modified)

103. BARKAI, J. L. Accuracy Inquiries for all Felony and Misdemeanor Pleas--Voluntary Pleas but Innocent Defendants? University of Pennsylvania Law Review, v. 126, n. 1:88-146. November 1977. (NCJ 43873)

The development of and rationale for the requirement that trial judges establish a factual basis for a guilty plea before accepting the plea are explored. An estimated 85 to 95 percent of all criminal convictions in the United States result from guilty pleas. By pleading guilty, a defendant does not forfeit his protections against unfair or improper actions during the plea process. Voluntariness and understanding are well-established constitutional prerequisites for valid guilty pleas. Growing interest in the institutional and personal pressures that induce defendants to plead guilty has accompanied the courts' formal recognition of plea bargaining. Of particular concern is the situation in which an innocent defendant's legal guilt is sealed by a plea of guilty. This concern is reflected in Rule 11 of the Federal Rules of Criminal Procedure and in several state cases and statutes requiring trial judges to determine the accuracy of guilty pleas. However, except under the Federal Standard, the accuracy inquiry generally is required only in felony cases. It is argued that no difference between felony and misdemeanor charges can justify the application of accuracy requirements solely to felony cases. It is proposed that an accuracy inquiry be extended to all felony and misdemeanor guilty pleas in State and Federal courts. The conclusion is made that such an extension will enhance the quality of criminal justice without producing undue costs for the lower courts. A proposed standard for the accuracy inquiry requires that the accuracy of a plea of guilty or nolo contendere be established on the record by the most reliable method available and under a standard of proof equivalent to the proof needed to defeat a motion for a directed verdict of acquittal. The proposal also provides that a judge may accept a guilty plea even if it does not meet the factual basis standard if the judge establishes on the record that the defendant, after being informed of the apparent factual deficiency of his plea, chose to plead and that there is a probability of conviction at trial.

104. BENNETT, L. A. Offer You Can't Refuse: The Current Status of Plea Bargaining in California. Pacific Law Journal, v. 7, n. 1:80-104. January 1976. (NCJ 31679)

This article defines plea bargaining, examines the established constitutional requirements and Federal statutory law on plea bargaining, and offers suggestions on developing a plea bargaining procedure for California. The author states that plea bargaining may be defined as the granting of certain concessions to the defendant in the event that he pleads guilty. Constitutional requirements with respect to plea bargaining are reviewed. These include voluntariness, fulfillment of any promises made, and the right to counsel during the plea negotiation process. Recent changes and provisions in the Federal statutory laws on plea negotiations are also outlined. The present status of plea bargaining in California is then discussed with respect to statutory and case law, and the need for a comprehensive scheme on plea bargaining is examined. Finally, specific problems in formulating a comprehensive plea bargaining scheme are addressed, including such issues as allowable concessions, judicial participation, the lack of correctional approaches, disclosure of the plea bargain, advice to the defendant, differential sentencing, and overcharging. The new Federal rules and model statutes are examined as potential sources of solutions to these problems. (Author abstract modified)

105. BISHOP, A. N. Guilty Pleas in Wisconsin. Marquette Law Review, v. 58, n. 4:631-653. (NCJ 56658)

This article reviews the Wisconsin Case Law concerning the voluntary entry of guilty pleas, and indicates the difficulties confronting defendants who enter guilty pleas and then seek post-conviction absolution. The Wisconsin courts, in compliance with constitutional and procedural mandates, must guarantee that pleas of guilty are voluntarily entered and are based on the truth of genuine guilt. The controlling factors in determining capacity to enter a guilty plea are the defendant's age, education, and mental capacity. Where the record shows that the guilty plea would not have been given if the defendant had had counsel, the plea is invalid. Although Wisconsin law requires observance of the defendant's right to counsel, the lack of such counsel raises an issue which must be preserved by post-conviction motion in the trial court as a condition to raising it on appeal. Without such motion, the right to counsel would be deemed waived. The decision of the U.S. Supreme Court in Boykin v. Alabama (1969) applies to Wisconsin procedure, holding that the defendant must knowingly surrender his or her right to trial, and that the record shows clearly that the guilty plea was entered voluntarily. Wisconsin state courts have enumerated the guidelines for trial judges' inquiry into defendants' understanding and free will. A fulfilled plea bargain negates later allegations of coercion, even if the judge does not follow the prosecutor's recommendation of probation. Plea withdrawal is allowed only to correct a clear injustice. Additional discussion concerns the use of Federal habeas corpus and State appellate review. A proposed "Guidebook for Judges and Attorneys" used in preparing the trial record is appended. Footnotes are provided.

106. BRAND, E. Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases. Fordham Law Review, v. 44:1010-1028. April 1976. (NCJ 37674)

Rule 11 was amended in 1966 to specify more fully the conduct required by the trial judge in accepting a plea, and again in 1974-75 to bring plea bargaining negotiations into open court and regulate their use. This note surveys the changes written into the amendments to this rule on the acceptance or rejection of guilty and nolo contendere pleas, analyzing the extent of their derivation from case law development before and since the 1966 rule, and probing their likely effect on judicial decisions to come. The new rule expands the personal discussion which must occur in open court between judge and defendant. Not only must the court determine that the defendant understands the nature of the charge and the consequences, but must inform him of them, particularly his rights to trial by jury, to confront one's accusers, and against self-incrimination. In addition, the consequences of the plea requirement is delineated to include the mandatory minimum and maximum possible penalty provided by law. Another section of the amended rule requires a determination of the accuracy (factual basis) of the guilty plea developed on the record. Two other related sections, however, are likely to engender controversy. They provide that if, at the time of a plea of guilty which is later withdrawn, or nolo contendere, or an offer to plead either, the defendant makes statements related to or in connection with the plea--on the record, under oath, and in the presence of counsel--evidence of such statements may be used in a subsequent perjury prosecution, though not in any other civil or criminal proceeding. It is concluded that, taken together, the changes add up to a renewed concern for consistent results in the courts and in tightened guidelines for trial judges.

107. BROWN, T., Jr. Criminal Procedure: Federal Rules of Criminal Procedure--Rule 11 Statements Concerning Voluntariness of Guilty Plea Not Conclusive Against Contradictory Petition for Post-Conviction Relief Under 28 USC @ 2255. Vanderbilt Law Review, v. 29, n. 6:1449-1463. November 1976. (NCJ 39248)

Review of a Federal court decision in Mayes v. Pickett (1976) concerning the conclusive nature of statements made by the accused at a Rule 11 hearing against contradictory allegations in a postconviction motion. Rule 11 of the Federal Rules of Criminal Procedure requires that negotiated pleas be accepted only when voluntarily and knowingly entered by the defendant. In defendant Mayes' Rule 11 trial to determine voluntariness of plea, extensive questioning of the defendant by the presiding judge satisfied the court as to the voluntary nature of his guilty plea. An appeal to the U.S. District Court denied a subsequent motion to vacate the sentence due to coercion through the use of threats to the defendant's pregnant wife and unkept promises of a reduced sentence in exchange for the plea of guilty. The U.S. Court of Appeals held that statements concerning the voluntary nature of a guilty plea made by an accused at a Rule 11 hearing are not conclusive against subsequent contradictory allegations made in a motion pursuant to a Federal post-conviction relief statute. The author examines previous Federal case law dealing with motions to vacate sentences and analyzes the reasoning behind the holding will increase filings under 28 U.S.C. Section 2255 and undermine the goal of a final determination of voluntariness at a Rule 11 hearing. He suggests adoption of a standard to govern the conclusiveness of Rule 11 testimony.

108. COGAN, N. H. Entering Judgement on a Plea of Nolo Cotendere: A Reexamination of North Carolina v. Alford and Some Thoughts on the Relationship Between Proof and Punishment. Arizona Law Review, v. 17, n. 4:992-1022. 1975. (NCJ 36473)

Review of the Supreme Court decision in North Carolina v. Alford (1970) which found the defendant's plea of guilty to a lesser charge valid despite the fact that it was accompanied by protestations of innocence. The author examines the English common law evolution of the plea of nolo contendere to illustrate the historical concern for certainty of proof in the context of plea offerings. A discussion of Alford against this common law background reaches the conclusion that this concern has been substantially diluted. (Author abstract modified)

109. __________. Guilty Pleas: Weak Links in the "Broken Chain." Criminal Law Bulletin, v. 10, n. 2:149-159. March 1974. (NCJ 13486)

Analysis of Tollett v. Henderson, a 1973 Supreme Court decision which held that a counseled guilty plea precluded challenging the indictment on the grounds that Blacks were systematically excluded from the grand jury. The author believes that there was little legal support for the Tollett decision, and fears that the Supreme Court may decide cases with similar issues accordingly. At issue is a view of a guilty plea as a break in the chain of events preceding the plea, as opposed to a view that a guilty plea is not voluntary if based on fear of a higher penalty or simply conviction, and it then develops that the law which induced the fear is found to be unconstitutional. Ultimately, the question is whether a counseled guilty plea is open to any challenge but the restrictive claim of ineffective assistance of counsel or the rare situation of lack of jurisdiction. (Author abstract)

110. ELGER, J. Due Process: Guilty Pleas--Constitutional Standards of Voluntariness Were Not Satisfied by a Plea of Guilty Where Defendant Was Unaware That Intent To Kill Was an Essential Element of Crime. American Journal of Criminal Law, v. 5, n. 1:105-120. January 1977. (NCJ 38798)

Review of the Supreme Court ruling in Henderson v. Morgan (1976) vacating the petitioner's 1955 second-degree murder conviction, holding that court and counsel had not informed him that intent was an element of the crime. The author examines the judicial development of the guilty plea process used in the U.S. and analyzes the two-prong test developed by the court for determining whether the constitutional plea of guilty is met in a given case. He concludes that, due to the vagueness of language in the majority opinion, state trial courts should follow the procedures of Rule 11 of the Federal Rules of Criminal Procedure until clearer guidance is provided by the court.

111. FLANAGAN, W.J. New Federal Rule of Criminal Procedure 11(E): Dangers in Restricting the Judicial Role in Sentencing Agreement. American Criminal Law Review, v. 14, n. 2:305-318. Fall 1976. (NCJ 39271)

This comment focuses on the difficulties anticipated under the new role which provides that prosecutors, defense lawyers, and the accused may agree to a particular sentence as part of a plea bargain. Another provision prohibits judges from participating on any plea negotiations. A brief survey of case law prior to the adoption of the new rule is presented, and the impact of changes wrought by the new law are analyzed. The several state rules governing plea bargaining are reviewed, and their advantages over the Federal scheme are considered. The author advocates studying the results of the Federal plan and certain state plans and amending the Federal legislation if the state experiences indicate that more judicial input in plea negotiations is desirable. (Author abstract modified)

112. FOURTEENTH AMENDMENT: DUE PROCESS AND PLEA BARGAINING--BORDENKIRCHER V. HAYES, 434 U.S. 357 (1978). Journal of Criminal Law and Criminology, v. 69, n. 4:484-492. Winter 1978. (NCJ 53678)

The institution of plea bargaining as a legitimate element of the criminal process is highlighted in view of the Bordenkircher decision. The Supreme Court held that the due process clause of the 14th Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if he does not plead guilty to the defense with which he was originally charged. This holding not only signals the expansion of the prosecutor's legitimate leverage in the plea bargaining situation but also may prove advantageous to defendants since it encourages prosecutors to bring their initial charges at a lower level. Until Bordenkircher, the court's few rulings on the issue have been directed at introducing safeguards into the plea bargaining situation. The court has held that a prosecutor's plea bargain must be kept (Santorello v. New York, 404 U.S. 257, 262, 1971), has recognized the need for a public record indicating that a plea was knowingly and voluntarily made (Boykin v. Alabama, 395 U.S. 238, 242, 1969), and has recognized the importance of counsel during plea negotiations (Brady v. United States, 397 U.S. at 758). Although Bordenkircher does not undercut these safeguards, it would be regrettable if the court were to move toward weighing the balance of power at the negotiating table in favor of the prosecutor. In future cases, the delineation of limits on the prosecutor's legitimate use of leverage of plea bargaining situations seems likely. Footnotes provided.

113. GLYNN, P. J. Impact of Plea Bargaining on Parole. Federal Bar Journal, v. 37, n. 1:76-79. Winter 1978. (NCJ 50806)

The effect of plea bargaining on parole decisionmaking is discussed; issues raised by parole-decision plea bargaining are considered analogous to plea-bargaining issues in sentencing. Plea bargaining issues in connection with the parole decision fall into two general categories: (1) the enforcement of a specific parole-related promise made by a prosecutor in exchange for a guilty plea, and (2) the consideration by the parole authority of criminal charges which have been dismissed as part of a plea bargain. There are a number of possible types of promises which might be given in exchange for a guilty plea, of which a recommendation for early parole is but one. Because such promises are similar to promises of sentence recommendations, they are logically enforceable under the provisions of

Santobello v. New York (1971), which held that violating a plea bargain promise not to make a sentencing recommendation warrants either resentencing without a prosecution recommendation or an opportunity to withdraw the plea. Case law indicates that ultra vires bargains have taken the form of promises that parole boards will grant early parole, will not revoke parole, or will make parole violation terms run concurrently with the new sentence based upon the negotiated plea. Although parole-related plea bargains have been held to be enforceable in various ways, there does not yet appear to be a clearly developed doctrine of whether specific performance will be required for ultra vires prosecution promises. In contrast, consideration of unadjudicated criminal conduct to determine sentences has long been condoned under case law. The rationale for this type of consideration is best explained in the Supreme Court's decision in Williams v. New York (1949) in which the court upheld the imposition of the death penalty by a judge who had considered evidence in addition to that presented to the jury, including information from the court's probation office and other sources that the defendant had committed serious crimes for which he was never convicted. The court rejected the contention that the defendant had been denied due process, ruling that the formal procedural requirements of the guilt determining process are neither required nor suited to the sentencing process. Since the parole decision must also take into account the seriousness of an individual's criminal behavior, paroling authorities, like sentencing courts, may also take into account unadjudicated criminal conduct, including serious charges reduced in the course of plea bargaining. Judicial decisions are footnoted.

114. GUILTY PLEAS. Journal of Criminal Law, Criminology and Police Science, v. 61, n. 4:521-526. December 1970. (NCJ 03508)

Redefinition of the concepts of voluntariness and intelligence in pleading, and its effects on Federal habeas corpus proceedings. Three Supreme Court cases--McMann v. Richardson, Brady v. United States, Parker v. North Carolina--narrow the possibility of obtaining habeas corpus hearings. The court decided that an accused who pleaded guilty with the advice of reasonably competent counsel, even if motivated by a coerced confession or fear of a harsh sentence, relinquished his right to review.

115. HOOKE, P. H. Prosecutors May Not Seek Habitual Offender Indictments Against Defendants Unwilling To Plead Guilty to Lesser Charges Without Valid Justification. Memphis State University Law Review, v. 7, n. 4:703-711. Summer 1977. (NCJ 56657)

The sixth circuit in Hayes v. Cowan (1976) held that prosecutors may not bring a habitual offender indictment against an accused who has refused to plead guilty to the same unenhanced substantive offense. Generally, a prosecutor's discretion over whom to indict and what charges to levy are constrained only by practical considerations of politics and limited resources. Nevertheless, the courts recognize that an official's powers may also be restricted by the constitutional guarantees of equal protection and due process. Discriminatory use of authority is ultra vires, and has been successfully challenged before the U.S. Supreme Court in United States v. Falk (1973) and in Blackledge v. Perry (1974). The high court considers the mere opportunity for, or the appearance of, retaliation by a prosecutor sufficient to inhibit a defendant's exercise of procedural rights, and to invalidate a subsequent conviction. The rationale of the sixth circuit in its reduction of a defendant's sentence to that which would have been obtained in plea bargaining rests on two grounds. The court recognized the inhibitive effect of possible prosecutorial retaliation if a bargain was rejected, and the cohesive effect of a prosecutor's charging powers against a bargaining defendant. A prosecutor may not threaten a defendant with the consequence that more severe charges may be brought if the defendant insists on exercising his right to a trial. In exceptional cases, where supervening events or discoveries justify a more serious charge, a new indictment may still be obtained. The prosecutor must, however, make the new information a part of the record, and carry the burden of dispelling any inference of retaliation. Footnotes are provided.

116. KOLKO, D. M. Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights. Albany Law Review, v. 41, n. 1:115-139. 1977.
(NCJ 40107)

Review and analysis of the constitutional development of the rules applying to the waiver of retroactive rights. Although in interpreting the constitution the Supreme Court has determined that certain newly recognized constitutional protections are so essential to the integrity of a criminal conviction that they should be made retroactive, both the U.S. Supreme Court and the New York Court of Appeals have held that defendants whose convictions were obtained by pleas of guilty may not benefit from these rights. The author traces the constitutional development of retroactivity and waiver by guilty plea from the original doctrine of Johnson v. Zerbst (1938), when the Supreme Court decided a waiver is valid only when it was knowing and voluntary. Under this doctrine, subsequent decisions could affect the validity of convictions based on pleas of guilty. In the 1970 decision Brady v. U.S., the Supreme Court abandoned the Zerbst rule and adopted an absolute concept of waiver. The implications of this shift in attitude and its effect on the New York Court of Appeals are discussed in a case-by-case analysis.

117. KOPEC, R. A. Standards for Accepting Guilty Pleas to Charges. University of Michigan Journal of Law Reform, v. 8, n. 3:568-593. Spring 1975. (NCJ 55891)

The article examines the constitutional and policy considerations that contribute to procedural safeguards for misdemeanor defendants pleading guilty. In order to be valid, a guilty plea must be made voluntarily and with understanding. A plea would be invalidated if the defendant had been coerced or intimidated by the police or the prosecutor or if the plea was the result of ignorance or misapprehension. Although the facts in Boykin v. Alabama (1969) gave no inference of coercion, the U.S. Supreme Court struck down the defendant's guilty plea because there was insufficient evidence that the plea was voluntarily entered. The court would not presume from a silent record the existence of the requisite waiver of the defendant's rights to a trial and to confront his accusers. The requirement that a trial judge assure that a defendant fully understand the consequences of his plea is a necessary procedural safeguard for the accused. The same standard of voluntariness and understanding applies to the acceptance of guilty pleas in misdemeanor as well as felony cases. Although some courts apply lesser standards in misdemeanor cases than in felony cases, it is recommended that similar inquiries be made in both classes of cases. In all misdemeanor cases, other than minor traffic offenses, the defendant should be made aware of the essential elements of the offense charged and ought to be asked if his plea was the result of any threat or promise. He should be advised of the consequences of the plea and of the waiver of his constitutional rights. The considerations of the quality of lower courts and of the additional burden on the courts are discussed. Footnotes are provided.

118. MANAK, J. P. Plea Bargaining: The Prosecutor's Perspective--An Overview of Selected Issues, the Current State of the Law, and a Proposed Model Procedure for Prosecutors, Chicago, National District Attorneys Association. 22 p. (NCJ 11103)

A review is presented of the advantages and disadvantages of the plea bargaining procedure for the courts, the prosecution, and the defense. Among the issues discussed are overcharging by police or prosecutor, lighter sentences for those who plead, and what constitutes a knowing and informed plea. Summaries of Supreme Court cases on plea bargaining are provided, as are detailed guidelines for negotiation.

119. MILLER, L. B. Judicial Discretion To Reject Negotiated Pleas. Georgetown Law Journal, v. 63, n. 1:241-255. October 1974. (NCJ 25325)

Discussion of the formal standards for the exercise of judicial discretion in the rejection of bargained pleas, established by the U.S. District Court of Appeals for the District of Columbia in United States v. Ammidown (1973). In Ammidown, the Court of Appeals vacated the judgment and sentences of the defendant holding that the trial judge had exceeded his discretion in rejecting the plea recommended by prosecutor. Under the guidelines set up by the court, a trial judge can only withhold his consent of a negotiated plea if it is unfair to the defendant, represents an abuse of the prosecutor's discretion, or severely infringes upon the judge's sentencing.

120. PALMER, R. A. Pleading Guilty: Illinois Supreme Court Rule 402 and the New Federal Rule of Criminal Procedure 11. University of Illinois Law Forum, v. 1975. n. 1:116-134. 1975. (NCJ 57055)

The development and application of old and new Illinois court rules governing the acceptance of guilty pleas in criminal cases are outlined and contrasted with both old and new Federal court procedures. Guilty pleas are a necessary and central feature of criminal justice both in Illinois and in the Federal judiciary. In Illinois, they represent 85 percent of all convictions punishable by imprisonment. A similar percentage of Federal felony convictions are by guilty pleas or pleas of nolo contendere. Due to the important consequences of the defendant's decision to plead guilty, a uniform, accurate, and fair procedure is needed for determining whether a guilty plea should result in conviction. In Illinois, the standards for accepting guilty pleas are prescribed in Supreme Court Rule 402. Federal Rule of Criminal Procedure 11 details the procedure followed in Federal courts. The new Federal Rule 11 is patterned largely after the Illinois rule, and both rely heavily on the American Bar Association's standards relating to guilty pleas. Both rules are designed to maximize the benefits of conviction without trial. Realization of this objective necessarily involved considering diverse interests: the procedure should preserve the advantages of expediency and efficiency such pleas afford the courts and defendants, while safeguarding the defendant's rights. Moreover, the interests of both society and the defendant are best served by a fair, accurate procedure which ensures acceptances of guilty pleas only when defendants are in fact guilty and want to plead so. Both rules are analyzed in view of these sometimes conflicting interests. After a brief discussion of the procedure used prior to Rule 402, the Illinois Supreme Court's efforts to construe the rule are examined. The construction placed on the Illinois rule is contrasted with that placed on the old Federal Rule 11 and with the provisions of the new Federal Rule. Whether strict compliance with the rules should be required also is discussed. Case references are footnoted.

121. ROSS, S. F. Bordenkircher v. Hayes: Ignoring Prosecutorial Abuses in Plea Bargaining. California Law Review, v. 66, n. 4:875-883. July 1978. (NCJ 54746)

The U.S. Supreme Court decision in Hayes is criticized. Trial judges are urged to oversee the plea bargaining process to prevent abuses and to preserve the mutuality of advantage which should be the basis of the process. In Bordenkircher v. Hayes, the U.S. Supreme Court upheld a conviction on a charge which the prosecutor admitted was filed solely because the defendant refused to plead guilty to another set of charges. In the Kentucky case Hayes was initially indicted for a $88.30 forgery, a crime punishable by 2 to 10 years in prison. The prosecutor threatened Hayes with reindictment as a habitual criminal if he refused to plea bargain for a 5-year sentence. Hayes refused and subsequently was sentenced to life imprisonment as a habitual criminal. He appealed the conviction on the grounds that the second charge was unconstitutionally vindictive. The U.S. Supreme Court recognized that the prosecutor's threat of harsher punishment might have had a "discouraging effect" upon a defendant's decision to exercise the right to trial, but called this "inevitable" in a plea bargaining system. In other cases the U.S. Supreme Court has consistently condemned charging decisions in which the prosecutor inhibits a defendant's exercise of legal rights. Oyler v. Boles, Blackledge v. Perry, and U.S. v. Falk are discussed. It is concluded that the Hayes decision did not preserve the "mutuality of advantage" model of plea bargaining. Judicial restraints are urged to prevent subsequent addition of more serious charges and irregular procedures. It is concluded that the trial judge should retain oversight over the plea bargaining process to prevent abuses and that prosecutors should be required to promulgate and adhere to regulations governing changing decisions. Footnotes contain references, case citations, and further discussion.

122. RUSSELL, E. L. Criminal Procedure: Prosecutorial Carte Blanche in the Plea Bargain Process--Bordenkircher v. Hayes, 98 S Ct 663 (1978). University of Florida Law Review, v. 30, n. 4:800-809, Summer 1978. (NCJ 53083)

This is case commentary on a U.S. Supreme Court decision which held that a prosecutor does not violate due process by seeking an enhanced indictment under a habitual offender statute if a plea bargain is refused. The defendant was accused of forging a check in the amount of $88.30. The prosecutor offered to recommend a 5-year sentence in exchange for a guilty plea. The defendant refused. Since the defendant had been convicted of two prior felonies, the prosecutor then sought and obtained an additional habitual offender indictment, which resulted in a life sentence. This case commentary traces the appeal through the Kentucky Court of Appeals, the Sixth Circuit Court of Appeals, and the U.S. Supreme Court. On certiorari, the U.S.

Supreme Court held the prosecutor does not violate due process by subsequently seeking an enchanced indictment under a habitual offender statute after a plea bargain is refused. The issue of prosecutorial vindictiveness is discussed at length. Previous judicial decisions have limited the rights of prosecutors to engage in retaliatory actions; these decisions are described in detail. The legal problems raised by the plea bargaining process are also reviewed. The Bordenkircher ruling is said to be legally palatable although the particular facts place the prosecutor in an unfavorable light. It is suggested that the problems raised by the plea bargain process cannot be solved by case law, but rather by specific curative legislation. Extensive footnotes contain references and a copy of the model code of pre-arraignment procedure of the American Bar Association.

123. SCHWARTZ, R. N. Guilty Plea as a Waiver of "Present But Unknowable" Constitutional Rights: The Aftermath of the Brady Trilogy. Columbia Law Review, v. 74, n. 8:1435-1463. December 1974. (NCJ 19144)

In this series of cases, the 1970 Supreme Court rejected collateral attacks on convictions based on guilty pleas purportedly induced by denial of constitutional rights subsequently announced and retroactively applied. The Brady trilogy consists of three cases--Brady v. United States, McMann v. Richardson, and Parker v. North Carolina. This article examines the Brady trilogy decisions and their underlying rationale, focusing on consistency with the functions served by guilty pleas in the criminal justice system, the well-settled principles of waiver, and the evolving standards of retroactivity in constitutional adjudication. Also considered is the problem of defining those rights which are not properly waivable by pleas of guilty, and the various standards developed by the lower Federal courts are analyzed. Several lower courts have suggested that a plea of guilty does not waive a "present but unknowable" right that gives the defendant a complete or absolute defense to the government's prosecution. Other cases have insulated rights implicating either the integrity of the conviction or the basic validity of the criminal law the defendant admitted violating. A distinction has also been made between non-waiverable substantive rights and waiverable procedural rights. In Blackledge v. Perry (1974), the Supreme Court held that "present but unknowable rights" rights that go "to the very power of the state to bring defendant into court to answer the charge against him" are not waived by a plea of guilty. The author sets out his own standard by proposing that rights relating to the establishment of the fact of guilt be made waivable by a plea of guilty. He maintains, however, that rights necessary to ensure the integrity of the defendant's plea determination should be shielded from any imputation of waiver. (Author abstract modified)

124. UNIVERSITY OF ARIZONA. Acceptance of Guilty Pleas. Arizona Law Review, v. 14, n. 3:543-550. 1972. (NCJ 07616)

Considerations of the pitfalls inherent in the guilty plea, the waiver of constitutional rights involved, and the problem of the guilty plea in Arizona courts. The author recommends that when accepting a guilty plea state judges should follow the procedures required of Federal judges under Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 sets forth three basic requirements which must be met before a guilty plea may be accepted--the defendant must be personally addressed by the trial court, the plea must be entered voluntarily and with an understanding of the charge and the consequences of the plea, and the judge must satisfy himself that a factual basis exists for the plea. (Author abstract)

125. UNIVERSITY OF MINNESOTA. Plea Bargaining: Proposed Amendments to Federal Criminal Rule 11. Minnesota Law Review, v. 56, n. 4:718-737. March 1972. (NCJ 06930)

Examination of Federal Criminal Rule 11 which recognizes the propriety of plea bargaining and sets forth a procedure for its implementation. Rule 11 now provides that a defendant may plead guilty, not guilty, or nolo contendere. The court has the power to reject a plea of guilty or nolo contendere and must not accept either without first determining from the defendant that the plea is voluntarily and understandingly made, and that there is a factual basis for the plea. The present rule was revised in 1966 in an attempt to ensure that the guilty plea was based on an informed decision. Proposed Rule 11 contains two distinct provisions--one applying recent court decisions to the current provisions of Rule 11 and the other creating a procedure for recognizing and implementing court-approved plea bargaining.

126. UVILLER, H. R. Pleading Guilty: A Critique of Four Models. Law and Contemporary Problems, v. 41, n. 1:102-131. Winter 1977. (NCJ 44687)

Three aspects of the guilty plea--its negotiation, its accuracy, and conditions for its withdrawal--are examined, with references to court decisions and various standards. The analysis focuses on the following issues: The legitimacy of conditions upon which the guilty plea offer is made and accepted; the differentiation between normal pressures of self-interest and intolerable inducements that deprive the guilty plea choice of its voluntary character; the requirement that the guilty plea be factually accurate; appropriate precautions for precluding the conviction of innocent parties; and revocation of the plea by the unilateral choice of the defendant. The courts and "model makers" (American Bar Association, American Law

Institute, National Advisory Commission on Criminal Justice Standards and Goals, and National Conference of Commissioners on Uniform State Laws), although in disagreement about many of the aspects of the guilty plea, have contributed to an understanding of the problems associated with the guilty plea and perhaps to the development of a practical, coherent doctrine. It appears that the negotiated settlement of a criminal case must be firmly accepted as a respectable conclusion of prosecution. Attention should be focused on assuring legal regularity in the negotiation process. Judgment by plea, when properly supervised, need not be inferior to judgment by verdict. Because not all terms or conditions are properly subject to negotiation and because not all means of persuasion are appropriate to bargaining, standards are needed to make clear the rights of the defendant and the circumstances deemed improper as conditions precedent to the plea. Obligations of the parties to full disclosure at the prepleading conferences should be articulated. Defendants should not be denied the participation of a judge in the bargaining process. Some relation should be established between the guilty plea and the facts to which it responds. Courts should allow the unilateral cancellation of the proper plea in any case in which some fundamental ingredient of the proper plea is shown to have been ignored, misunderstood, or perverted.

127. VAUGHAN, M. M. I Swear That I Am Guilty, So Help Me God--The Oath in Rule 11 Proceedings. Fordham Law Review, v. 46, n. 6:1242-1272. May 1978. (NCJ 54818)

Procedural rules governing the acceptance of guilty pleas entered in Federal courts are scrutinized. Rule 11 of the Federal Rules of Criminal Procedures governs guilty plea proceedings. In 1975, pursuant to a proposal by the U.S. Supreme Court, Congress extensively amended that rule. Part of the amendment is a provision that defendants who plead guilty may be placed under oath for subsequent questioning by the court and may be subject to perjury charges if they testify falsely. A related provision requires that judges explain to defendants that if they plead guilty they may be asked questions under oath and that they may be prosecuted for perjury if they lie. This explanation must be included in the litany of warnings judges give defendants during plea proceedings regardless of whether the judge actually intends to place the defendant under oath. An analysis of these provisions, their legislative history, and their application in court in the context of other Rule 11 amendments concludes that the practice of placing defendants under oath when they plead guilty should be abandoned. While it is unlikely that the practice per se could be challenged successfully on constitutional grounds, it may present constitutional problems in individual cases. In addition, the threat of a perjury sanction may discourage some defendants from entering intelligent and advantageous guilty pleas, thereby defeating a principal purpose of the Rule 11 amendments. Abandoning the practice of placing guilty pleaders under oath would obviate the need for the related warning, eliminating problems posed by that provision. It is further concluded that, in an attempt to protect the rights of uninformed defendants by amending the rule governing plea proceedings, Congress and the courts have curtailed some rights of counseled and intelligent defendants who want to enter advantageous pleas of guilty without being subjected to extensive personal inquisition by the court. (Author abstract modified)

128. WESTEN, P. and D. WESTIN. Constitutional Law of Remedies for Broken Plea Bargains. California Law Review, v. 66, n. 3:471-539. May 1978. (NCJ 52206)

The law of contracts is contrasted with constitutional law in this examination of remedies for broken plea bargains, based on the Santobello v. New York case. In the Santobello case, the Supreme Court held that a defendant has a constitutional right to relief when the state breaches a promise made in return for a guilty plea. The court, however, refrained from deciding what remedies are constitutionally prescribed in such cases. To determine what particular remedy, if any, is required by the Santobello case, it is necessary to ascertain the nature of the constitutional interest that is violated by the state's breach of a plea agreement. Five approaches to this determination are: distinguish the rejection of an inducement from its acceptance, focus on the court's characterization of an inducement as a benefit or as a burden, eschew asserted constitutional differences between benefits and burdens or between the acceptance and rejection of inducements, assume that there is no valid distinction between an inducement as a benefit or burden, and emphasize the principle that the state cannot impose burdens on constitutional rights by discouraging their assertation. The difference between benefits and burdens is significant because it bears on the conclusion that the constitutional interest to be protected is the defendant's self-interest in receiving the full benefit of procedural entitlements. A guilty plea is invalid if it is based on an inducement that is so advantageously compared to the alternative value of a standing trial that even the defendant who believes himself to be factually innocent would plead guilty. Most procedural rights are designed to protect innocent defendants from being falsely convicted; whenever the state allows a defendant to waive all procedural rights by pleading guilty, it runs the risk that an innocent defendant will be falsely convicted. There are two alternatives with negotiated pleas: prohibit the state from offering defendants any inducements to plead guilty, or identify inducements that present the greatest risk of false conviction. In addition to requiring that waivers of constitutional rights be voluntary, the U.S. Constitution stipulates that waivers be made intelligently. The state has an obligation to treat defendants with dignity and respect, and the requirement that a defendant's plea be intelligent involves the disclosure of information. If the courts acknowledge that defendants have a constitutional interest in the protection of their reasonable expectations, the courts will include that defendants have a right to demand specific performance as a remedy for broken plea agreements. The law of contracts and constitutional law are both concerned with agreements and, in the area of plea agreements, the law of contracts serves to inform judgments of constitutional law. Supporting case law is cited.

129. WILLIAMSON, T. S., Jr. Constitutionality of Reindicting Successful Plea Bargain Appellants on the Original Higher Charges. California Law Review, v. 62, n. 1:258-293. January 1974. (NCJ 15770)

Appraises the rule permitting reprosecution on the original, higher charges in relation to due process, double jeopardy, and equal protection. Reprosecution on the original, higher charges after successful appeal is considered a violation of due process. Using North Carolina v. Pearce, the policy of imposing harsher sentences in retaliation for taking an appeal is said to be a violation of due process. A discussion of Mullreed v. Kropp is intended to illustrate the general inadequacy of double jeopardy as a doctrinal approach to the scope-of-reprosecution problem in plea bargain cases. It is held that a court relying on the strict scrutiny or intensified means standard of equal protection should hold that the rule permitting reprosecution of successful plea-bargain appellants on the original, higher charges is unconstitutional.

130. YALE UNIVERSITY. Rule 11 and Collateral Attack on Guilty Pleas. Yale Law Journal, v. 86:1395-1421. June 1977. (NCJ 44014)

The utility of hearing records compiled under Rule 11 of the Federal Rules of Criminal Procedure in the disposition of postconviction challenges to guilty pleas is assessed. Rule 11 governs the hearings at which pleas of guilty are entered. The rule was substantially amended in 1975 to expand the hearing and thus provide a more comprehensive record of matters bearing on the validity of a plea. It was hoped that such a record would assist Federal courts in reviewing the large number of postconviction challenges to guilty pleas. Such challenges generally are based either on the defendant's alleged misunderstanding at the time of the plea or on events occurring outside the plea that may affect its validity. In the former situation, the Rule 11 record may be helpful in disposing of postconviction challenges. In the latter case, the record may be less helpful. The defendant may easily impeach the findings made at the Rule 11 hearing as to the voluntariness of his plea or the nonexistence of secret plea bargaining. The defendant's failure to raise claims about these matters during the hearing cannot properly be interpreted as a waiver of such claims. The Rule 11 record cannot eliminate the need for postconviction hearings when plea challenges contain credible allegations of government coercion or secret promises. Some Federal courts, in their concern with finality for criminal convictions, have established evidentiary and other barriers to attacks on guilty pleas. In addition, rules of procedure for most postconviction motions attempt to provide for the disposition of such motions without a full hearing, in part by expanding the written record on which the motions may be considered. Such techniques either will fail to eliminate profitless hearings on the validity of guilty pleas or will mechanically deny hearings regardless of the merits of the challenge. Postconviction attacks on guilty pleas must be heard despite the costs in time and expense that such hearings entail. (Author abstract modified)

APPENDIX A—CASE SUMMARIES

Brady v. U.S., 397 U.S. 742 (1970)

During prosecution for kidnaping and transporting the victim in interstate commerce, Brady was advised by competent counsel throughout and elected to plead not guilty. After his codefendant, who had earlier confessed, pleaded guilty and became available to testify against him, Brady changed his plea to guilty. Because the indictment charged that the kidnaping victim was not liberated unharmed, the defendant faced a maximum penalty of death. After the trial judge questioned him twice to ascertain whether his plea was voluntary, the judge accepted Brady's guilty plea. The defendant was sentenced to 50 years' imprisonment, later reduced to 30.

The issue present was whether the petitioner's plea of guilty was voluntary. The court held that where a defendant was advised by competent counsel and tendered his plea only after his codefendant pled guilty and became available to testify against the defendant, the defendant's plea was not rendered involuntary because of possible fear of the death penalty in a jury trial. The court reasoned that the defendant's guilty plea was voluntary; he was subjected to no threats or promises in face-to-face encounters with authorities. He had competent counsel and a full opportunity to assess the advantages and disadvantages of trial as compared with those attending a plea of guilty. The court concluded that plea bargaining was "inherent in the criminal law and its administration." (397 U.S. at 751)

North Carolina v. Alford, 400 U.S. 25 (1970)

The defendant was indicted for the capital crime of first-degree murder. At that time North Carolina law provided life imprisonment when a plea of guilty was accepted to a first-degree murder charge; the death penalty following a jury verdict of guilty unless the jury recommended life imprisonment; and from 2 to 30 years' imprisonment for second-degree murder. The defendant's attorney, in the face of strong evidence of guilt, recommended a guilty plea but left the decision to the defendant. The prosecutor agreed to accept a plea of guilty to second-degree murder. The trial court heard damaging evidence from certain witnesses before accepting a plea. Although disclaiming guilt, the defendant pleaded guilty because of the threat of the death penalty. He was sentenced to 30 years in prison. The Court of Appeals, on an appeal from a denial of a writ of habeas corpus, found that the defendant's guilty plea was involuntary because it was motivated principally by fear of the death penalty.

The issue presented to the Supreme Court was whether the trial judge committed a constitutional error in accepting appellee's guilty plea. The Court held that the trial judge did not commit constitutional error in accepting the plea. The Court based its decision on the fact that there was strong factual basis for a plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed innocence. The Court also stated that it was not in the mandate of the 14th amendment and the Bill of Rights to disallow Alford the choice to plead guilty to second-degree murder and insist on proving him guilty of murder in the first degree.

McMann v. Richardson, 397 U.S. 765 (1970)

Three New York defendants were convicted of various criminal charges. The Court of Appeals for the Second Circuit reversed the convictions in each case on the basis that the defendants pleaded guilty because of prior coerced confessions.

The issue was whether the defendant is entitled to a hearing if, in a collateral proceeding, a guilty plea is shown to have been triggered by a coerced confession and if there would have been no plea if there had been no confession. The Supreme Court held that the New York defendants who had entered guilty pleas with the advice of counsel were not entitled to a hearing on habeas corpus petitions alleging that their confessions had been coerced and that the improperly procured confessions induced their guilty plea. The Court reasoned that a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. When a defendant waives his State Court remedies and admits his guilt, he assumes the risk of error in either his or his attorney's assessment of the law and facts. Although the Court said he might have pleaded differently if later cases had then been the law, he was bound by his plea and his conviction unless he could allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not after all a "knowing and intelligent act." (397 U.S. at 1450)

Santobello v. New York, 404 U.S. 257 (1971)

After negotiations with the prosecutor, the petitioner withdrew his previous not-guilty plea to two felony counts and pleaded guilty to a lesser-included offense, the prosecutor having agreed to make no recommendation about sentence. When the petitioner appeared for sentencing many months later, a new prosecutor recommended the maximum sentence, which the judge imposed. (The judge stated that he was uninfluenced by the recommendation.) Petitioner attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal.

The issue here was whether the State's failure to keep a commitment concerning the sentence recommendation on a guilty plea required a new trial. The court held that the interest of justice and proper recognition of the prosecutor's duties in relation to promises made in connection with "plea bargaining" require that the judgment be vacated and that the case be remanded to the State courts for further consideration. The State court should decide on remand whether the circumstances required only that there be specific performance of the agreeement on the plea (in which case the petitioner should be resentenced by a different judge), or whether petitioner should be afforded the relief he sought in withdrawing his guilty plea.

Boykin v. Alabama, 395 U.S. 238 (1969)

Defendant Boykin was charged with common law robbery. He pleaded guilty to all five indictments, was convicted, and was sentenced to death by electrocution. The record revealed that the judge asked no questions of the petitioner concerning his plea, and the petitioner did not address the court.

The issue before the Court was whether it was a reversible error for the trial judge to accept the petitioner's guilty plea without showing that it was intelligent and voluntary. The Court held that there was reversible error where the record did not disclose that Boykin voluntarily and understandingly entered pleas of guilty. The Court reasoned that, since a plea of guilty is more than a confession which admits that the accused did various acts but is in itself a conviction, the confession's admissibility must be based on a reliable determination of the voluntariness issue thus satisfying constitutional rights of the defendant.

Parker v. North Carolina, 397 U.S. 795 (1970)

The defendant, a 15-year-old Black youth, was indicted for first-degree burglary, an offense punishable by death under North Carolina law. Parker and his mother signed written statements authorizing the entry of a plea of guilty. They were both aware when they signed the authorization for the guilty plea that the petitioner would receive the mandatory sentence of life imprisonment if the plea was accepted. The prosecutor and the trial judge accepted the plea. When accepting the plea, the trial court asked the defendant if the plea was made in response to any promise or threat. The defendant answered in the negative and affirmed that he tendered the plea "freely without any fear or compulsion." When the plea was accepted, the defendant was sentenced to life imprisonment. Several years later, Parker filed a petition under the North Carolina Post Conviction Hearing Act to obtain relief from his conviction. The Court of Appeals of North Carolina affirmed the conviction.

The issues in question were: Was the petitioner's plea of guilty the product of a coerced confession? Was it involuntary because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a jury verdict of guilty? The Court held that the petitioner's plea of guilty was intelligent and voluntary. An otherwise valid plea is not involuntary because it is induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. The Court also concluded that the record contained abundant evidence contradicting Parker's claim of coercion.

Blackledge v. Perry, 417 U.S. 21 (1971)

The defendant, Perry, had been involved in a prison altercation in North Carolina which resulted in his being convicted of assault with a deadly weapon, a misdemeanor. After Perry exercised his rights under North Carolina law to a trial de novo in a higher court, the prosecutor obtained a felony indictment in the same incident for assault with a deadly weapon with intent to inflict serious bodily injury.

At issue was whether the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal and thus contravened the due process clause of the 14th amendment. The Court held that the prosecutor's action was not constitutionally permissible even though there was no specific evidence of bad faith or malice. Due process protects a defendant from fear that a prosecutor will retaliate by "upping the ante" against a defendant who exercises his right to a trial de novo. (471 U.S. at 28)

Tollett v. Henderson, 411 U.S. 258 (1973)

After the defendant was indicted by a grand jury for the crime of first-degree murder, he pleaded guilty and was sentenced to a term of 99 years in prison.

The issue here was whether a State prisoner, pleading guilty with the advice of counsel, may later obtain release through Federal habeas corpus by proving only that the indictment was returned by an unconstitutionally selected grand jury. The Court held that when a criminal defendant, on advice of counsel, has solemnly admitted in open court that he is guilty of a charged offense, he may not thereafter raise independent claims relating to deprivation of constitutional rights that antedated his plea. He may only attack the voluntary and intelligent character of the plea by showing that counsel's advice was not within the standards of the governing Supreme Court decision. In order for the defendant to obtain relief by way of Federal habeas corpus, the petitioner is required not only to establish unconstitutional discrimination in selection of grand jurors, but also that his attorney's advice to plead guilty without having inquired about the composition of the grand jury made that advice outside the attorney's range in criminal cases.

Ring v. United States, 419 U.S. 18 (1974)

The defendant was convicted of conspiracy to import cocaine. The Court of Appeals affirmed the conviction and denied the defendant's motion for a rehearing. During the trial, the government's chief witness testified that no promises had been made to her with respect to the three counts of an indictment returned against her involving the same events for which the defendant stood trial. During the summation, the defense counsel indicated that two counts against the witness had been dropped in return for testimony. The prosecution summarily denied such a fact. The Solicitor General, however, stated that government records indicated that such an agreement had been made.

The issue presented was whether the defendant's conviction should be vacated because of the government's failure to disclose a plea bargain with the chief prosecution witness. The Court held that it would not initially decide whether the government had failed to make any required disclosures, but it would vacate the judgment of the Court of Appeals and remand the case to that court.

Gregg v. Georgia, 428 U.S. 195 (1976)

The defendant was convicted of armed robbery and murder and sentenced to death.

The central issue in this case was whether the imposition of the death sentence under the Georgia statute was "cruel and unusual punishment." The Supreme Court affirmed the conviction. The Court also addressed a plea bargaining issue, and stated that the State prosecutor's discretion in selecting cases to be prosecuted and cases for plea bargaining did not affect the validity of the State's death penalty statute.

Weatherford v. Bursey, 429 U.S. (1977)

Bursey and Weatherford were arrested for a State criminal offense. Weatherford, an undercover agent, had two pretrial meetings with Bursey and Bursey's counsel. Bursey's trial strategy was not discussed at either of these meetings. After Weatherford, who told Bursey that he would not be a prosecution witness, nonetheless testified for the prosecution, Bursey was convicted. After serving his sentence, Bursey brought a civil rights action for damages against Weatherford, alleging that the defendant's (Weatherford's) participation in the two meetings with Bursey's counsel had deprived Bursey of effective assistance of counsel and a fair trial.

The issue presented was whether the conduct of the undercover agent for a State law enforcement agency deprived the defendant of his right to the effective assistance of counsel or the right to due process of law. The Court held that the defendant was not deprived of his right to counsel under the sixth amendment, which does not establish a per se rule forbidding an undercover agent to meet with defendant's counsel. As long as the information possessed by Weatherford about the two meetings remained uncommunicated, he posed no threat to Bursey's sixth amendment rights. The Court also held that there is no constitutional right to plea bargain. Thus, the defendant was not denied a fair trial in violation of the due process clause on the ground that he lost the opportunity to plea bargain through the alleged duplicity of an undercover agent.

Bordenkircher v. Hayes, 434 U.S. 357 (1978)

The defendant, Hayes, was originally indicted by a grand jury on a forged check charge in the amount of $88.30. Under Kentucky law at that time, this charge carried a 10-year maximum sentence. In plea negotiations, the prosecutor offered to recommend a sentence of 10 years if Hayes pleaded guilty. He also warned that if Hayes did not plead guilty to "save the court the inconvenience and necessity of trial," he would return to the grand jury and seek an indictment under the Kentucky Habitual Criminal Act, which mandated a life sentence on conviction. Hayes did not plead guilty. He was convicted in the check case in a separate proceeding, and he was found to be a habitual criminal and sentenced to life imprisonment.

The issue was the prosecutor's right to bring additional charges against a defendant expressly for the purpose of pressuring the defendant into entering a plea of guilty of reduced charges. The Court held that the prosecutor's warning to Hayes that he would be indicted as a habitual criminal if he refused to plead guilty to the forged check charge and the prosecutor's subsequent successful habitual criminal indictment and conviction did not violate due process. The Court emphasized that Hayes had been warned at the onset of the plea conference of the prosecutor's intention to seek a recidivist indictment. "As a practical matter...this case would be no different if the grand jury had indicted Hayes as a recidivist from the onset, and the prosecution had offered to drop that charge as part of the plea bargain." The Court concluded that although confronting the defendant with the risk of more severe punishment may have "a discouraging effect on the defendant's assertion of his trial rights, the imposition of those difficult choices is an inevitable and permissible...attribute of any legitimate system which tolerates and encourages the negotiation of pleas." (434 U.S. at 364, quoting Chaffin v. Stynchcombe, 412 U.S. 17 31 [1973])

APPENDIX B—REPRINT OF FEDERAL RULE 11

FEDERAL RULE 11

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea Is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good

cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e) (1) (A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e) (1) (B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Aug. 1 and Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979.)

APPENDIX C—LIST OF SOURCES

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3. Yale University Law School
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